Supreme Court, U.S.
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NO. ____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HTC INDUSTRIES, INC.,

Petitioner,

v.

WILLIAM PERRY, SECRETARY
OF DEFENSE,

Respondent.

**On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Federal Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When government contracting personnel other than a contracting officer make misrepresentations, some of which are criminal, to a government contractor, whether the duty of good faith and fair dealing implied in all government contracts requires the government to pay for the damage caused by those misrepresentations.

2. When the government takes benefits from a contractor under an unauthorized contract, whether the contractor is entitled to payment for the benefits taken on a *quantum meruit* basis.

LIST OF PARTIES AND RULE 29.1 LISTING

The parties to this proceeding are those listed in the caption.

HTC Industries, Inc. is now defunct, and its only shareholders, Dr. and Mrs. H.T. Couch, are pursuing this case as its successor in interest pursuant to General Statutes of Connecticut § 33-378(e) (1987). *See* Decision of Armed Services Board of Contract Appeals dated October 30, 1992 at 14-16 (reproduced at 43a-45a). Pursuant to Supreme Court Rule 29.1, HTC Industries, Inc. states that it never had any parent or subsidiary companies.

Secretary of Defense William Perry has been substituted for Secretary of Defense Les Aspin, the appellee in the United States Court of Appeals for the Federal Circuit, pursuant to Supreme Court Rule 35.3.

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ON PETITION FOR A WRIT OF CERTIORARI
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FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner HTC Industries, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit, along with the dissent of Judge Newman, and its order on petition for rehearing and suggestion for rehearing in banc (reproduced in the appendix at 1a-16a and 75a-76a) were not reported. The opinions of the Armed Services Board of Contract Appeals (reproduced in the appendix at 17a-58a and 77a-80a) were reported at 93-1 BCA (CCH) ¶ 25,560 (A.S.B.C.A.), *aff'd on reconsideration*, 93-2 BCA (CCH) ¶ 25,701 (A.S.B.C.A. 1992). The decision of the contracting officer (reproduced in the appendix at 59a-74a) was not reported.

JURISDICTION

The United States Court of Appeals for the Federal Circuit entered its judgment in this matter on March 7, 1994. That Court denied petitioner HTC Industries, Inc.'s timely petition for rehearing on April 15, 1994. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1993).

STATUTES AND REGULATIONS INVOLVED

The provisions of 31 U.S.C. §§ 1341, 1342, 1349, and 1350 (1983 and Supp. 1994) and 48 C.F.R. § 32.704 (1993) are reproduced in the appendix at 81a-85a.

STATEMENT

In August, 1984, Dr. and Mrs. Harold T. Couch formed HTC Industries, Inc. ("HTC") to pursue the

development of titanium diboride coating technology. The United States Army awarded a cost plus fixed fee contract to HTC for research on titanium diboride (the "Contract") on March 30, 1985. The Contract incorporated the Limitation of Cost Clause found at 48 C.F.R. § 52.232-20 (APR 1984).

The Contract designated a contracting officer ("CO"), and a contracting officer's technical representative ("COTR"). The CO had explicit written authority over any increases in the price of the contract, and her approval was necessary before proceeding from each task to the next. The COTR was to provide technical advice, but was explicitly forbidden in writing from ordering any changes to the scope, cost, or schedule of the contract.

This allocation of authority between the two broke down almost immediately. In Dr. Couch's first contact with the designated CO, the CO told him that he should send all further correspondence to Mr. Andrew DeVita. Mr. DeVita was a contract specialist -- not a contracting officer. In accordance with that instruction, Dr. Couch made a written request of Mr. DeVita to proceed from Task I to Task II, a power reserved under the contract to the CO.

Dr. Couch received no response from the CO nor Mr. DeVita. Instead, on September 30, 1985, the COTR instructed HTC to proceed into Task II and the Army continued to reimburse HTC's monthly vouchers for work under Task II through June 1986. This became the norm. Throughout the life of the contract, the COTR conducted all meaningful contact with, and supervision of, HTC.

By June, 1986, more than a year after award of the contract, problems with constructing the titanium diboride plating facility called for by the Contract arose causing HTC to require more than the allotted contract monies to finish the work. Beginning on July 11, 1986, HTC repeatedly notified the government of the overrun in various telephone calls, a written progress report, and a written overrun proposal.

Specifically following the original CO's instruction, Dr. Couch twice (August 4 and August 7, 1986) called Mr. DeVita to notify him of the overrun. Mr. DeVita told Dr. Couch that the original CO was no longer employed in the contract office and *that HTC did not now have a CO*. He directed Dr. Couch to send the overrun proposal to the COTR and a second contract specialist in the contracts office.

In fact, as of August 5, HTC did have a second CO assigned to the contract. On that date, this CO wrote the first of two notes to the COTR requesting information about the overrun situation at HTC, clearly showing that she had knowledge of the overrun. HTC was not informed of the existence of this second CO at that time, and indeed, never knew of her existence until years later, when her existence was revealed in the discovery phase of this proceeding.

This second CO never received any response to her notes from the COTR. She never responded to HTC's overrun proposal as the government's own regulations required her to do. *See* 48 C.F.R. § 32.704 (reproduced at 84a-85a). Rather, through her inaction, she allowed the

COTR to engage in a continuing course of further misrepresentation as set forth below.

On August 12, 1986, Dr. Couch mailed the requested proposal for contract extension and funding of the overrun to the COTR and to the designated contract specialist in the contracts office as he had been directed to do by Mr. DeVita. In his cover letter to the COTR, HTC indicated regret about the overrun, but stated that "the monies involved [were] simply too large for [HTC] to 'swallow.'" Government Trial Exhibit G-5.

After receiving no response for a month, Dr. Couch telephoned the COTR on September 17, 1986 to determine the status of the overrun proposal. During that phone call, the COTR told Dr. Couch to continue the work and that he [the COTR] would find the money.

On October 1, 1986, the COTR and his assistant traveled to HTC's offices to meet with Dr. Couch. The COTR again told Dr. Couch to keep working and that the COTR would find the money. In the expectation that HTC would get paid, Dr. Couch delivered several samples of tools coated with titanium diboride to the COTR for the COTR to take them to the government's laboratory for further testing.

Based on these and subsequent conversations with the COTR, Dr. Couch continued to work on the project and incur costs, which HTC paid, from July 1986 until March 1987. On two more occasions, Dr. Couch met with government representatives and provided them with further samples at their request. The government tested these

samples for its benefit. Unbeknownst to HTC, the government's scientists, including the COTR, used these samples as the basis for scientific papers they published without requesting HTC's permission. All the while, the COTR encouraged HTC to continue the work and to believe that he could find the money for further funding.

In March, 1987, the plating facility was severely damaged when a glove failed. The Army abruptly lost interest in the project and refused to pay for any of the continued work after making an assessment of the damage.

In January 1988, the Couches were contacted by a contract specialist from the contracts office to set up a meeting to discuss settlement on February 5, 1988. Dr. and Mrs. Couch attended that meeting with the contract specialist and the COTR. The Couches came away from this meeting with the understanding that they had reached a tentative settlement, the terms of which were that HTC would release the government from all claims in return for free and clear title to the facility. The contract specialist represented that he did not have the authority to give the final approval to the deal, but that he thought his superiors would approve it. He said that he would be back in touch with the final approval soon.

Based on this meeting, the Couches repaired the facility at their own expense during the month of February. However, no letter from the contract specialist was forthcoming. During March, 1988, Dr. Couch called the contract specialist to find out what had happened. The

contract specialist said that he was sorry, but the deal was off and the matter had been taken out of his hands.

On April 12, 1988, HTC received a notice of termination for convenience effective as soon as the facility was delivered to the government. On May 13, the termination for convenience was amended to make it effective immediately.

The Couches continued to believe that the government would ultimately act in good faith and work out a reasonable settlement. Thus, during the summer of 1988, HTC competed for and won a grant from the State of Connecticut Board of Higher Education in the amount of $100,000 that would have allowed them to continue the work in conjunction with the University of Connecticut.

On September 23, 1988, HTC submitted its termination settlement proposal in the amount of approximately $195,000. HTC's counsel wrote to the Termination Contracting Officer ("TCO") on October 19 requesting permission for HTC to use the facility for the University of Connecticut research noting that time was of the essence. On October 28, the TCO wrote that he recognized that HTC was entitled to a share of the facility and that the government was obligated to distribute the property equitably. Nonetheless, he concluded that the government could not allow the facility to be used for any other research. HTC's counsel wrote to the TCO on November 10 to request a meeting to discuss the use of the facility, but never received a reply.

On December 1, Dr. Couch wrote to the University of Connecticut noting that HTC would have to withdraw from the grant because the government would not allow HTC to use the facility. Thoroughly disgusted with the government's inaction, Dr. Couch wrote to the TCO on December 27 telling him that HTC was going out of business and that it had no further interest in recovering the facility.

Less than two weeks later, on January 6, 1989, the TCO wrote to HTC requesting HTC's permission for the government to use the facility in research at the University of Connecticut. In view of the government's declaration only two months before that HTC could not use the facility for any other research, this request was nothing short of remarkable. HTC's counsel wrote back on February 2 stating that HTC would not release the facility without payment from the government and again requesting a meeting. On August 9, 1989, the TCO denied HTC's termination settlement proposal in all important respects.

HTC filed its claim with the CO on November 7, 1989 pursuant to the Contract Disputes Act, 41 U.S.C. § 605 (1987). The CO denied the claim entirely on March 7, 1990. (The decision of the contracting officer is reproduced at 59a-74a.) The Couches then brought their case to the Armed Services Board of Contract Appeals ("ASBCA") under 41 U.S.C. § 607 (1987 & Supp. 1994). After the Couches tried the case *pro se*, the ASBCA found that:

> [The COTR] encouraged Dr. Couch to continue work to supply samples and cooperate with [government] efforts to find out how close the process was to being

> optimized, an end also much in the interests of Dr. Couch's business hopes. We further find that [the COTR] encouraged Dr. Couch to believe [the COTR] could find the money to continue the work. However, we can not find that any guarantees were given by [the COTR] and we find Dr. Couch either knew or should have known that.

Decision of ASBCA dated October 30, 1992 at 10 (The decision of the ASBCA is reproduced at 17a-58a, and the quoted passage is found at 34a.) By the same token, the Board found the facts relating to the government's behavior in arbitrarily abandoning settlement negotiations and denying further use of the plating facility much as HTC described them. *Id.* at 12-13 (reproduced at 38a-40a). Nonetheless, the ASBCA found that HTC was not entitled to any relief on grounds of the government's breaches of the implied duty of good faith and fair dealing nor equity.

HTC then appealed to the United States Court of Appeals for the Federal Circuit pursuant to 41 U.S.C. § 607(g)(1)(A) (1987) and 28 U.S.C. § 1295(a)(10) (1993). In a split decision, the panel majority found that the government had not violated the implied duty of good faith and fair dealing because "no authorized officer of the Government misled HTC." Decision of the Federal Circuit dated March 7, 1994 at 5 (reproduced at 6a). The panel majority also denied any equitable relief. *Id.* at 6 (reproduced at 7a).

In a stinging dissent, Judge Newman disagreed with the panel majority and correctly analyzed this case. She wrote:

- "HTC Industries ... was led into doing additional work and incurring additional costs for the benefit of the government. ***The government not only solicited, but received, accepted, and used that additional work.***" Dissent of Judge Newman at 1 (emphasis added) (reproduced at 9a).

- "***I can not share the view that the government was blameless.*** [The COTR] ... continued to encourage Dr. Couch to work on the technological problems. [The COTR] asked for, received, and tested, various titanium diboride coatings that were prepared by HTC ***after the contract was known to have overrun its cost.***" Dissent of Judge Newman at 2 (emphasis added) (reproduced at 10a-11a).

- "For the Contracting Officer's Technical Representative to obtain and use the contractor's work under the conditions that [the COTR] eventually admitted to have existed ***was a violation of statute and regulation.*** See 31 U.S.C. §§ 1341-42 (government employees prohibited from accepting voluntary services); FAR § 32.704(c).... ***There were other violations by the government.***" Dissent of Judge Newman at 3 (emphasis added) (reproduced at 11a-12a).

- "Fairness as well as precedent require that the government accept reasonable responsibility for the consequences of ***this serious lapse in***

contract administration." Dissent of Judge Newman at 4 (emphasis added) (reproduced at 12a).

- "***HTC made serious allegations*** relating to, for example: positions taken by certain witnesses before the Contracting Officer and later admitted before the Board to be incorrect; the withdrawal of the settlement offer without advising the contractor; the backdated affidavit; the false statements that were corrected only after discovery by HTC of contrary government documents. ***The government does not dispute the correctness of these charges, even the mildest view of which transcends merely arbitrary behavior.*** ... The Board stated that these allegations were considered to the extent that they 'relate to the credibility of the evidence.' ... ***I deem this response inadequate to the seriousness of these occurrences.***" Dissent of Judge Newman at 7 (emphasis added) (reproduced at 15a-16a).

As these passages from Judge Newman's dissent point out, the decision of the panel majority is contrary to fairness and established precedent. The government's actions in this case drove the Couches into personal bankruptcy and caused them to lose their home and their business. They are entitled to have the established law applied to their case. Accordingly, HTC petitions this Court for a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ because the decision of the Federal Circuit conflicts with the decisions of this Court and those of the Federal Circuit's predecessor court, the Court of Claims. In addition, the decision fundamentally alters contract law and profoundly changes the relationship between government contractors and the government. Such an important change warrants this Court's review.

I. THE DECISION OF THE FEDERAL CIRCUIT CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE COURT OF CLAIMS.

A. The Decision of the Federal Circuit as to the Implied Duty of Good Faith and Fair Dealing Conflicts with the Decisions of This Court and the Court of Claims.

The Federal Circuit's cases recognize that the government, as a contracting party, must abide by the duty of good faith and fair dealing implied in all contracts just as any other contracting party must. *Texas Instruments, Inc. v. U.S.*, 991 F.2d 760, 764 (Fed. Cir. 1993); *Malone v. U.S.*, 849 F.2d 1441, 1445-46, *modified*, 857 F.2d 787 (Fed. Cir. 1988). *See* 48 C.F.R. § 1.602-2(b) (1993). However, its decision here limits the government's duty only to the conduct of authorized contracting officers and excludes the conduct of all other government contracting personnel. Decision of Federal Circuit dated March 7, 1994 at 4-5 (reproduced at 5a-6a) (holding that government did not violate the implied duty of good faith and fair dealing because "no *authorized* officer of the government misled HTC." [emphasis added]).

That decision is in direct conflict with a long line of decisions from this Court that hold that "the Government will be liable [for misrepresentations to contractors] in the same circumstances that private individuals would be liable." *MacArthur Bros. Co. v. U.S.*, 258 U.S. 6, 12 (1922). *Accord United States v. Smith*, 256 U.S. 11, 16-17 (1921); *United States v. Atlantic Dredging Co.*, 253 U.S. 1, 10-12 (1920); *United States v. Spearin*, 248 U.S. 132, 136-37 (1918); *Christie v. U.S.*, 237 U.S. 234, 241-42 (1915); *Hollerbach v. U.S.*, 233 U.S. 165, 171-72 (1914). The government expects to hold contractors liable for the misrepresentations of their personnel. *See, e.g., Muschany v. U.S.*, 324 U.S. 49, 59 (1945) ("It goes without saying that in all dealings with the government[,] contractors and agents alike are under an obligation to deal strictly within the limits of the statutes and with absolute honesty.")

Contractors who make misrepresentations to the government may be held criminally liable for those misrepresentations under 18 U.S.C. § 1001 (1976) and other statutes. If the contractor is a corporation, it may be held criminally liable for the misrepresentations of its employees even though the employees have acted "against the express orders of the [corporation]." *New York C. & H.R.R. Co. v. U.S.*, 212 U.S. 481, 493 (1909).

Moreover, as a matter of general agency law, "a principal is liable for an agent's misrepresentations that cause pecuniary loss to a third party, when the agent acts within the scope of his apparent authority." *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 566 (1982). That rule is routinely applied in contract actions. *See, e.g., Citibank, N.A. v. Nyland (CF8) Ltd.*, 878 F.2d 620, 623-24 (2d Cir. 1989); *Wal-Mart Stores, Inc. v. Crist*, 855 F.2d 1326, 1331 (8th Cir. 1988), *cert. denied*,

489 U.S. 1090 (1989). Although apparent authority generally does not apply against the government, the treatment of private individuals under this rule should provide substance to the government's implied duty of good faith and fair dealing if, as this Court has held, the government is to be held liable for affirmative misrepresentations on the same terms as private individuals.

That apparent authority does not apply against the government does not mean that misrepresentations by unauthorized government officials do not violate the government's implied duty of good faith and fair dealing. "The implied duty may also be breached even though both parties act within their contractual rights." *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 769 F.Supp. 599, 651-52 (D.Del. 1991), *aff'd in part and rev'd in part on other grounds*, 988 F.2d 386 (3d Cir.), *cert. denied*, 114 S.Ct. 289 (1993). Thus, a government employee's misrepresentation may violate the implied duty even though the government may not be held otherwise liable for it because of a lack of authority. That rule breathes life back into this Court's principle of equality of treatment as between the government and its contractors.

The principle of equality cries out for vindication in a case like this one. Congress has specifically made it a criminal offense for government personnel to enter into contracts in excess of appropriations or to accept voluntary services when no appropriations are available. 31 U.S.C. §§ 1341, 1342, 1349, 1350 (reproduced at 81a-83a). These criminal statutes specifically apply to all officers or employees of the United States Government -- they are not limited to authorized contracting officers. 31 U.S.C. §§ 1341, 1342. Likewise, the accompanying regulations provide that "*[g]overnment personnel* encouraging a

contractor to continue work in the absence of funds will incur a violation of Revised Statutes Section 3679 (31 U.S.C. 1341) that may subject the violator to civil or criminal penalties." 48 C.F.R. § 32.704(c) (1993) (emphasis added) (reproduced at 85a).

The ASBCA specifically found that the COTR encouraged HTC to continue the work in the absence of funds. Decision of ASBCA dated October 30, 1992 at 10 (reproduced at 34a). In her dissent, Judge Newman specifically pointed out the violation of these statutes and the regulation, Dissent of Judge Newman at 3 (reproduced at 11a), but the panel majority made little mention of any of these provisions.

In addition, the ASBCA found that the second CO had become involved by August 5, 1986 -- before Dr. Couch's second telephone conversation with Mr. DeVita -- and that she had sent the notes to the COTR. Decision of ASBCA dated October 30, 1992 at 10-11 (reproduced at 35a-36a). The ASBCA also found that despite the involvement of the second CO, Mr. DeVita told Dr. Couch that HTC did not have a CO. *Id.* at 11 (reproduced at 36a). This misrepresentation kept HTC from dealing with a CO on the overrun as the government now claims it should have.

Thus, not only was there criminal misconduct, there were misrepresentations by more than one government employee and misrepresentations that prevented HTC from doing what the government now claims it should have done. To allow the government to escape liability for this gross misconduct of its employees would invite it to take advantage of unwary contractors through the device of having contracting officers avoid any contact with contractors. That problem becomes even greater when the contractor is a small

and inexperienced company, like HTC, that cannot afford battalions of lawyers and contract experts to defend its interests.

The handling of the settlement negotiations illustrates the danger. The government chose when to have the settlement meeting. It chose whom it would send to the meeting. Those representatives reached a tentative settlement agreement with HTC. The government then abandoned the tentative agreement without any notice nor explanation to HTC and abruptly terminated the Contract. Yet, under the Federal Circuit's decision, the government has no liability for the manifest bad faith of these actions because the government chose not to send authorized personnel to negotiate. That is not the type of equal treatment of the government that this Court's cases mandate.

Nor is the principle laid down by the Federal Circuit consistent with the precedents of its predecessor court, the Court of Claims. Rather, the Court of Claims has repeatedly recognized that in some cases, the COTR or the equivalent is the person who deals with a contractor on a regular basis and that the government must be held liable for that person's representations or misrepresentations. For example, the Court of Claims held:

> The statements of the Technical Representative cannot be completely disavowed and repudiated on the ground that he was without authority to speak for the contracting officer. When an official of the contracting agency is not the contracting officer, but has been sent by the contracting officer for the express purpose of giving guidance in connection with the contract, the

> contractor is justified in relying on his representations.

Max Drill, Inc. v. U.S., 427 F.2d 1233, 1243, 192 Ct.Cl. 608 (1970) (citations and footnote omitted). The Court of Claims upheld this principle in other cases. *Fox Valley Engineering, Inc. v. U.S.*, 151 Ct.Cl. 228, 240 (1960); *General Casualty Co. v. U.S.*, 127 F.Supp. 805, 812-13, 130 Ct. Cl. 520, *cert. denied*, 349 U.S. 938 (1955).

The Federal Circuit's decision that the government is liable under the implied contractual duty of good faith and fair dealing only for misrepresentations of its authorized contracting officers conflicts with the precedents of this Court and the Court of Claims. Because the Federal Circuit has exclusive jurisdiction over contract claims, it is particularly important that this Court grant the writ and correct the Federal Circuit's unwarranted departure from well-established law.

B. The Decision of the Federal Circuit as to the Availability of Equitable Relief Conflicts with the Decisions of This Court and the Court of Claims.

In the Federal Circuit, HTC claimed as part of a broader waiver argument that it was entitled to equitable relief even if the Contract was unauthorized. In denying any equitable relief, the Board found that "[t]he CO was the only person authorized to change or expand HTC's contract" and that the CO had no actual or constructive knowledge of the continued performance. Decision of the Federal Circuit dated March 7, 1994 at 6 (reproduced at 7a). *But see*

Dissent of Judge Newman at 5 (reproduced at 13a-14a) (arguing that HTC was entitled to equitable relief).

The principle that a contractor may recover equitable relief in *quantum meruit* or *quantum valebant* when he has provided goods or services under an illegal or unauthorized contract goes back more than a century. *Clark v. United States*, 95 U.S. 539, 542-44 (1877) (awarding *quantum meruit* relief to a government contractor who entered into an illegal oral contract with the government). This Court has awarded equitable relief to a government contractor even when the government rescinded the ostensible contract because of the contractor's fraudulent conduct in obtaining it. *Crocker v. U.S.*, 240 U.S. 74, 81 (1916).

The Court of Claims has applied this principle as well. *Yosemite Park and Curry Co. v. U.S.*, 582 F.2d 552, 560, 217 Ct.Cl. 360 (1978); *Prestex, Inc. v. U.S.*, 320 F.2d 367, 373, 162 Ct.Cl. 620 (1963); *Douglas Aircraft Co. v. U.S.*, 95 Ct.Cl. 140, 147 (1941) (government conceded liability on equitable principles for goods retained under an illegal contract). As the *Prestex* court put it, "the basic fact of legal significance charging the Government with liability in these situations is its retention of benefits in the form of goods or services." 320 F.2d at 373 (footnote omitted). In this case, there is no doubt that the government's representatives took experimental samples, which cost thousands of dollars to produce, from HTC and retained them for its own use and testing. Indeed, its representatives published three scientific papers based in part on these samples.

The Federal Circuit's only asserted justification for failing to grant equitable relief was the CO's lack of knowledge of the continuing work. Decision of the Federal

Circuit dated March 7, 1994 at 6 (reproduced at 7a). Nothing in any of the cases of this Court or the Court of Claims suggests that lack of knowledge or authority is any basis for denying equitable relief if the government retains the benefits of the goods or services. If this Court will grant equitable relief even when the contractor engaged in affirmative misconduct, see *Crocker*, 240 U.S. at 81, then surely such relief is also available when the government engages in misconduct towards the contractor. The decision of the Federal Circuit is in direct conflict with the decisions of this Court and the Court of Claims, and this Court should grant the writ to resolve the conflict.

II. THE QUESTIONS PRESENTED ARE IMPORTANT.

The Federal Circuit's holding that the government may escape liability for affirmative misrepresentations made by any of its contract personnel other than the contracting officer dramatically alters the relationship between government contractors and the government. The venerable principle that the government should deal fairly and honestly with contractors loses all vitality when the government can evade it simply by using someone other than a contracting officer to mislead a contractor. Coupled with its holding that the government need not pay for what it takes because of the misrepresentations of its personnel, the Federal Circuit has in effect given government contract personnel other than contracting officers a license to steal.

This Court should not allow this profound change in the law to stand unreviewed. The Federal Circuit's decision implicates every federal government contract because the duty of good faith and fair dealing is implied in each of them. In addition, most government contracts involve

government contract personnel other than a contracting officer. For those reasons, the decision has broad national implications far beyond the particular contractor involved here.

Another recent decision of the Federal Circuit illustrates the point. *Hoskins Lumber Co. v. U.S.*, 20 F.3d 1144 (Fed. Cir. 1994). In that case, the U.S. Forest Service allowed various loggers to extend the termination dates of their logging contracts because the price of timber had fallen dramatically. Loggers had until February 15, 1984 to file for the extension. On that date, the United States District Court for the District of Oregon enjoined the United States from enforcing the deadline.

Immediately thereafter, the contractor asked various government personnel, including the contracting officer, whether the deadline would be extended during the pendency of the injunction. All of them indicated that the deadline would be extended. When the United States Court of Appeals for the Ninth Circuit ruled that the District Court had not had subject matter jurisdiction, the United States refused to honor its earlier commitments. The government also sought damages from the contractor claiming that the contractor had defaulted by not completing the contract within the specified time -- even though the government now prohibited logging on the same land.

In another 2-1 decision, the Federal Circuit again ruled that the government had no obligation to stand behind the representations of its employees because these employees, including the contracting officer, had no authority to extend the deadline. To add insult to injury, the Federal Circuit even awarded damages to the government for the contractor's failure to cut timber timely on land where

cutting was now prohibited. In short, the Federal Circuit's recent decisions in this case and *Hoskins Lumber* will serve to disrupt the relationships between the government and its contractors.

As a practical matter, rational government contractors can no longer rely on the word of any government contract personnel other than a contracting officer. As the facts of this case demonstrate, the contracting officer is often far from the actual administration of a contract. If every communication must come through the contracting officer, then the normal administration of government contracts will be greatly hampered. Moreover, as *Hoskins Lumber* shows, the written word of a contracting officer may not be worth anything in the end.

The Federal Circuit's decisions encourage wrongdoing by government contract personnel because they eliminate the consequences for bad behavior. These kinds of decisions can only lead to more bad behavior, a result the law should discourage rather than encourage. In the hands of those government personnel with little ability to resist temptation, the decision can lead to great mischief; in the hands of the thoroughly unscrupulous, it leads to disaster. The personal disaster that befell Dr. and Mrs. Couch in this case -- they were driven into personal bankruptcy and they lost their home and business -- is a perfect example of what can result from the unchecked and arbitrary power that the Federal Circuit decision condones.

That the decision here conflicts with a long line of established precedent demonstrates the radical change it effects. A lower court's dramatic change in the law alone should warrant this Court's review. However, the change made here cries out for particular attention from this Court

because it is made in an area in which the Federal Circuit has exclusive jurisdiction. For that reason, decisions of other circuits are not likely to pull the law back to its proper course. Having declined petitioner's suggestion for rehearing in banc, it is also unlikely that the full Federal Circuit will correct the erroneous decision that two of its members have made in this case. Indeed, the decision in *Hoskins Lumber* shows that the Federal Circuit persists in going down the wrong road. The only way that this erroneous decision is likely to be corrected in the near future is if this Court grants review of this case.

As a final consideration, the Federal Circuit's decision is, as a matter of morality, wrong. No fair-minded person can hear the facts of this case and reach the conclusion that the government was not morally obligated to pay for the work it took from HTC. To allow the government to escape that moral responsibility is a result this Court should not countenance. On the contrary, fundamental fairness dictates that this Court should grant the writ and do justice.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit should be granted.

Respectfully submitted,

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DATED: July 8, 1994

APPENDIX

APPENDIX A

United States Court of Appeals
For the Federal Circuit

93-1304

HTC INDUSTRIES, INC.,

Appellant,

v.

Les Aspin
SECRETARY OF DEFENSE,

Appellee.

DECIDED: March 7, 1994

Before NEWMAN, MICHEL, and RADER, Circuit Judges.

RADER, Circuit Judge.

DECISION

HTC Industries, Inc. (HTC) appeals the decision of the Armed Services Board of Contract Appeals. The Board denied HTC's claim for an equitable adjustment in contract price. HTC Indus., ASBCA No. 40562, 93-1 B.C.A. (CCH) ¶ 25,560 at 127,312, aff'd on recons., 93-2 B.C.A. (CCH) ¶ 25,701 (1992). Because substantial evidence supports the Board's decision, this court affirms.

DISCUSSION

Jurisdiction

This court reviews only final decisions of the boards of contract appeals. 28 U.S.C. § 1295(a)(10) (1988). The Government questions this court's jurisdiction in this case because the Board remanded for resolution of quantum issues.

Under the Contract Disputes Act, the Board reviews decisions of contracting officers. 41 U.S.C. § 607(d) (1988). Therefore, to discern the finality of board decisions, this court examines the scope of the contracting officer's decision. Teller Envtl. Sys., Inc. v. United States, 802 F.2d 1385, 1389 (Fed. Cir. 1986). This court does not apply a strict finality requirement to board appeals. Garrett v. General Elec. Co., 987 F.2d 747, 751 (Fed. Cir. 1993).

In this case, the CO's decision did not reach the quantum issues remanded by the Board. The CO only considered whether HTC should prevail on its claim for an

equitable adjustment. The Board affirmed the CO's denial of entitlement to an adjustment. The Board fully addressed the CO's decision and issued a final ruling on it. Therefore, this court can review this final judgment of the Board.

Moreover, this court's Rule 27(e) states that "[a] motion to dismiss for lack of jurisdiction . . . should be made as soon after docketing as the grounds therefor are known." The Board decision containing the remand issued on October 30, 1992. This case was docketed on April 15, 1993. The Government first raised this jurisdictional issue in a brief filed in this court on September 13, 1993.

Authority of the Technical Representative

Mr. Levy, the Contracting Officer Technical Representative (COTR) lacked authority to modify HTC's contract price, quantity, quality, or delivery schedule. The contract itself expressly noted the limits of Mr. Levy's authority. Federal Acquisition Regulation (FAR) § 52.232-20(e) (Limitation of Cost Clause), referenced in the contract, states: "No notice, communication, or representation . . . from any person other than the Contracting Officer, shall affect this contract's estimated cost to the Government." 48 C.F.R. § 52.232-20(e) (1992). HTC's contract at Section G, contained the following:

> NOTE: NO DIRECTION, INSTRUCTION OR INFORMATION, EMANATING FROM THE COTR . . . WHICH MAY MODIFY THE SCOPE OF WORK UNDER THIS CONTRACT, CHANGE THE

> ESTIMATED COST OF THE WORK UNDER THE CONTRACT, OR TIME OF PERFORMANCE THEREUNDER, SHALL BE BINDING ON THE GOVERNMENT UNLESS A PRIOR AUTHORIZED INSTRUMENT OR MODIFICATION TO THIS CONTRACT IS DULY ISSUED BY THE CONTRACTING OFFICER.

HTC also received a copy of Mr. Levy's COTR appointment letter, which explicitly stated his limitations. The letter, addressed to Mr. Levy, stated: "Your authority, under this appointment, authorizes you to take any and all actions . . . PROVIDED such actions DO NOT involve a change in price, quantity, quality, or delivery schedule."

Explicit, unambiguous language in a contract controls the dealings between the parties. Parties to a contact must be able to rely on clear statements of their rights and obligations in a contract. As the Board decision aptly stated, this case is "a classic example of why contracts are put in writing." HTC Indus., 93-1 B.C.A. (CCH) at 127,312.

Implied actual authority to bind the Government in contract may exist under certain circumstances. H. Landau & Co. v. United States, 886 F.2d 322 (Fed. Cir. 1989). However, in the instant case, the words of the Supreme Court in Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947) govern:

> [A]nyone entering into an arrangement with the Government takes the risk of having accurately

> ascertained that he who purports to act for the Government stays within the bounds of his authority.

Id. at 384. In this case, the Board found: "Dr. Couch was admittedly aware of the express written limitations on Mr. Levy's authority, as well as the specific terms of the 'Limitation of Cost' clause." HTC Indus., 93-1 B.C.A. (CCH) at 127,305. The record amply supports this finding.

Knowledge of the Contracting Officer

HTC also claims that the Government did not timely respond to its cost overrun proposal. FAR § 32.704 states that upon learning of an approaching cost overrun, the CO shall promptly obtain funding information and notify the contractor in writing. 48 C.F.R. § 32.704(a)(1) (1992). The CO did not send HTC any notice of an impending cost overrun. HTC, however, was also delinquent. FAR § 52.232-20(b) states that the contractor shall notify the CO in writing when there is reason to believe that the costs will exceed seventy-five percent of the estimated cost of the contract. 48 C.F.R. § 52.232-20(b)(1) (1992). HTC submitted no bimonthly progress reports between February 11, 1986 and July 28, 1986. During that period, HTC's costs exceeded seventy-five percent of the estimated cost. HTC did not, however, send its cost overrun proposal to the Contracting Office until August 12, 1986.

Thus, this case does not fall within the rule enunciated in Malone v. United States, 849 F.2d 1441 (Fed. Cir. 1988). In Malone, the CO's evasive conduct misled a

contractor. The contractor then performed seventy percent of its contractual obligation in reliance on a workmanship standard the CO later found unacceptable. This court held that the Government materially breached its implied obligation to refrain from interfering with the contractor's performance. In this case, however, HTC knew or should have known that the COTR could not change the contract's price, quantity, quality, or delivery schedule. The Board properly found that no authorized officer of the Government misled HTC.

Estoppel

HTC also alleges estoppel because the Government acquiesced in HTC's understanding of the contract and induced HTC to continue performance. Office of Personnel Management v. Richmond, 496 U.S. 414 (1990), does not apply in this suit where HTC is not "claim[ing] entitlement contrary to statutory eligibility criteria." Burnside-Ott Aviation Training Ctr., Inc. v. United States, 985 F.2d 1574, 1581 (Fed. Cir. 1993). Estoppel has four elements:

> (1) the government must know the true facts; (2) the government must intend that its conduct be acted on or must so act that the contractor asserting the estoppel has a right to believe it so intended; (3) the contractor must be ignorant of the true facts; and (4) the contractor must rely on the government's conduct to his injury.

JANA, Inc. v. United States, 936 F.2d 1265, 1270 (Fed. Cir. 1991), cert. denied (sic), 112 S. Ct. 869 (1992).

Again, explicit knowledge, as found by the Board, prevails over HTC's assertions after the fact. The Board found:

> The correspondence does indicate quite clearly however, that at least as of 20 February 1987 Dr. Couch was not operating under any illusion that reimbursement was to be expected.

HTC Indus., 93-1 B.C.A. (CCH) at 127,304. Therefore, HTC was not ignorant of the true facts. Also the CO had no actual or constructive knowledge. The Board properly denied HTC's estoppel claim.

Equitable relief

HTC contends that the Government waived the Limitation of Cost Clause by continuing to ask for work with knowledge of contract overruns. Flight Dynamics Research Corp., ASBCA Nos. 35248, 35755, 88-3 B.C.A. (CCH) ¶ 20,861 at 105,499-500 (1988). Again, the Board found that the CO had no actual or constructive knowledge of continued performance induced by Government representatives. The CO was the only person authorized to change or expand HTC's contract. The Board correctly declined to reimburse HTC's costs as overrun expenses based upon Mr. Levy's encouragement. HTC always had the option of refusing to perform further without the CO's authorization as the contract envisioned.

CONCLUSION

Substantial evidence supports the Board's decision. No officer with authority under the contract to bind the Government induced HTC to continue performance in the face of cost overruns.

COSTS

Each party to bear its own costs.

United States Court of Appeals
For the Federal Circuit

93-1304

HTC INDUSTRIES, INC.,

Appellant,

v.

LES ASPIN,
SECRETARY OF DEFENSE,

Appellee.

NEWMAN, Circuit Judge, dissenting.

HTC Industries, conducting a technological project by contract with the government, was led into doing additional work and incurring additional costs for the benefit of the government. The government not only solicited, but received, accepted, and used the additional work. I can not agree that the government has no responsibility to the contractor for this work.

A

The designated Contracting Officer's Technical Representative was Mr. Milton Levy, a scientist employed by the Army Materials Testing Laboratory (AMTL). Dr. H.T. Couch was the principal official of HTC Industries. The contract was for the development of titanium diboride

coating technology, an area in which Dr. Couch had prior experience.

At the inception of the contract the Contracting Officer, Ms. Tully, told Dr. Couch to deal with Mr. DeVita, a "contract specialist." Dr. Couch never again heard from Ms. Tully. When the potential cost overrun became apparent and Dr. Couch asked Mr. DeVita where to send the proposal for continued funding, Mr. DeVita responded that there was no Contracting Officer assigned to the HTC contract, and instructed Dr. Couch to send the proposal to Ms. Jackie Hart, another "contract specialist". Dr. Couch's written proposal for extension of the contract was sent to Ms. Hart, Mr. DeVita, and Mr. Levy. Dr. Couch was never advised of its status. However, Mr. Levy encouraged him to continue to work. There was no response to Dr. Couch's letters, from any Contracting Officer or anyone else, except Mr. Levy. The Board found as fact, and the government agrees, that

> Mr. Levy encouraged Dr. Couch to believe Mr. Levy could find the money to continue the work.

Board op. at 10.

The panel majority states that Dr. Couch should not have believed Mr. Levy. I can not share the view that the government was blameless. Mr. Levy, in his role as the Contracting Officer's Technical Representative, continued to encourage Dr. Couch to work on the technological problems. Mr. Levy asked for, received, and tested, various titanium diboride coatings that were prepared by HTC after the

contract was known to have overrun its cost. The written reports from HTC were not acknowledged by any other official. Throughout the entire contract period all authorizations that the contract stated must come from the Contracting Officer, including the critical movement from Task I to Task II, came only from Mr. Levy.

Another Contracting Officer, Ms. Gelaznik, was eventually appointed. She recognized that the contract funds were exhausted, requested an audit, and sent two written inquiries to Mr. Levy. These inquiries were never answered by Mr. Levy, as he admitted to the Board. Contracting Officer Gelaznik made no contact with the contractor, did not answer Dr. Couch's letters, or take any action that could have spared HTC the continuing expense that it was incurring at Mr. Levy's behest. Mr. Levy admitted to the Board that he never told Dr. Couch that his efforts to find funding were unsuccessful, stating that he told him only that no funds were available at a particular time, even as he encouraged Dr. Couch to make additional coating samples.

For the Contracting Officer's Technical Representative to obtain and use the contractor's work under the conditions that Mr. Levy eventually admitted to have existed was a violation of statute and regulation. See 31 U.S.C. §§1341-42 (government employees prohibited from accepting voluntary services); FAR §32.704(c). It is presumed that government officials act lawfully. Dr. Couch was not required to assume otherwise. It was not unreasonable for him to believe Mr. Levy's representations for, as Dr. Couch points out, the government accepted

HTC's products and continued to test them, as it had throughout the contract.

There were other violations by the government. The FAR requires the government to issue a written notice to the contractor when the limit of funding is approached. The Board found that:

> The government does not dispute appellant's evidence that the contracting officer never sent appellant the written notice provided in FAR 32.704 [Limitation of Cost or Funds].

Board op. at 11. Instead of this required warning, meetings were held to discuss technological progress, Mr. Levy's assistant Dr. Bhansali visited the HTC research facility in Connecticut, additional samples were requested, the government tested the samples, and Mr. Levy and his staff issued reports and publications containing the results. Although undoubtedly Dr. Couch had a commercial interest in continuing the work, that does not excuse the improper administration of this contract to the contractor's detriment.

Fairness as well as precedent require that the government accept reasonable responsibility for the consequences of this serious lapse in contract administration. This is not a scene of first impression. Recon Systems, Inc., 79-2 BCA ¶ 14,058 (1979), aff'd on reconsideration, 80-1 BCA ¶ 14,245 (1980), dealt with the situation wherein the Contracting Officer received notice of an overrun and took no action while a project officer expanded the work. The Contracting Officer

> failed to make a timely determination of the availability of funds and to advise [the contractor] accordingly, but rather allowed the final tasks under the contract to be sent to the contractor and the Government to accept and use the end product.

80-1 BCA at 70,180. The Board imputed knowledge of the project officer's actions to the Contracting Officer because the Contracting Officer had been notified of the expected cost overrun and did not act on this imputed knowledge. The Board held that the government was bound by this failure to act. 79-2 BCA at 69,095-96. Similarly in Flight Dynamics Research Corp., ASBCA Nos. 14523 & 15163, 88-3 BCA ¶ 20,861 at 105,499-500 (1988), the Board held that when the government asked for and received the benefit of a contractor's work when it knew the contract had overrun, the government should pay for the benefit despite a Limitation of Cost clause. See also Clevite Ordinance, 1962 BCA ¶ 3330 at 17,153-55 (1962).

In Gould, Inc. v. United States, 935 F.2d 1271, 1275 (Fed. Cir. 1991), this court held that if the government received a benefit under an illegal contract, equitable relief may be granted to the contractor. This obligation flows from the government's implied duty of good faith and fair dealing, see Malone v. United States, 849 F.2d 1441 (Fed. Cir.), modified, 857 F.2d 787 (Fed. Cir. 1988); United States v. Amdahl Corp., 786 F.2d 387, 393 (Fed. Cir. 1986), and the obligation to pay for benefits received, see Prestex, Inc. v. United States, 320 F.2d 367, 373 (Ct. Cl. 1963) ("No one would deny that ordinary principles of equity and justice preclude the United States from retaining

the services, materials, and benefits and at the same time refusing to pay for them on the ground that the contracting officer's promise was unauthorized or unenforceable for some other reason").

The Board found that the role of the Contracting Officer in the HTC contract "was barely visible," and that:

> The evidence indicates that the AMTL Contracts Division did not closely monitor this contract and that the AMTL technical people did not coordinate their actions with the contracting officer.

Board op. at 11. As the Board stated in Recon, "[t]he contractor does not have the duty to coordinate the various Government offices involved in different aspects of monitoring contract performance." 79-2 BCA at 69,095.

The action of HTC in continuing to prepare and submit titanium diboride coating samples was reasonable under the circumstances of this case. I must dissent from the denial of all recompense.

B

It is as important that the government deal fairly with contractors, as it is that contractors deal fairly with the government. See Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 387 (Jackson, J., dissenting) ("It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitutes a one-way street"); Beta Systems,

Inc. v. United States, 838 F.2d 1179, 1185-86 (Fed. Cir. 1989); FAR §1.602-2(b) (contracting officers shall "[e]nsure that contractors receive impartial, fair, and equitable treatment").

Thus the conduct during the termination proceedings requires comment. For example, the contract incorporated FAR §52,232-20(h) requiring the government to reach an equitable distribution of the property upon completion of the work. On this issue the Board found:

> [A]ppellant's attorney attempted to obtain the electrodeposition facility for appellant's use. Appellant had hopes of entering into a contract with the University of Connecticut with the aid of a $100,000 grant from the State of Connecticut. In late October 1988, the TCO advised appellant that the electrodeposition facility [sic] could not be used. . . . Dr. Couch then withdrew from the University of Connecticut project and advised the TCO that he no longer had any interest in acquiring the facility . . . . In early January 1989, the TCO advised appellant the government was willing to make the facility available to the University of Connecticut to do further research.

Board Op. at 13. The government does not now defend this arbitrary behavior.

HTC made serious allegations relating to, for example: positions taken by certain witnesses before the Contracting Officer and later admitted before the Board to be

incorrect; the withdrawal of the settlement offer without advising the contractor; the backdated affidavit; the false statements that were corrected only after discovery by HTC of contrary government documents. The government does not dispute the correctness of these charges, even the mildest view of which transcends merely arbitrary behavior. The Board found:

> With respect to [HTC's] allegations of . . . falsification of evidence, and loss, suppression, or destruction of evidence the Government concedes these allegations could have relevance to the contractual dispute. Its initial contention that these allegations should be dismissed for lack of specificity seems to have been abandoned in its post hearing brief.

Board Op. at 18. The Board stated that these allegations were considered to the extent that they "relate to the credibility of the evidence." Id. I deem this response inadequate to the seriousness of these occurrences.

On the undisputed findings that the Contracting Officer's Technical Representative encouraged the additional work, and received and used the benefits thereof, fair payment to the contractor is required. See Amdahl, 786 F.2d at 393 (Where a benefit has been conferred by the contractor on the government . . . a contractor may recover at least . . . the value of the conforming goods or services . . . ."). Thus I respectfully dissent from the decision to affirm the Board's ruling.

APPENDIX B

ARMED SERVICES
BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
HTC Industries, Inc.	)	ASBCA No. 40562
	)	
Under Contract	)	
No. DAAG46-85-C-0026	)	

APPEARANCE(S) FOR
THE APPELLANT: Dr. Harold T. Couch, President
Christine B. Couch, Secy/Treasurer

APPEARANCE(S) FOR
THE GOVERNMENT: COL Riggs L. Wilks, Jr., JA
Chief Trial Attorney
MAJ Oren W. Smith, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE LUSSIER

This is an appeal by HTC Industries, Inc. (HTC) from the decision of the contracting officer denying a claim by appellant for an equitable adjustment in contract price based upon alleged actions and inactions of Government representatives. Only the issue of entitlement, not quantum, is before us at this time for decision. A three-day hearing was held and briefs and reply briefs have been filed. Appellant is appearing pro se. Appellant's brief contains

quite extensive factual evaluation of the evidence including its deductive reasoning leading to its view of the facts and the credibility of witnesses. We have carefully reviewed and considered all of the evidence and all of the arguments. We state at the outset that our findings of fact are limited, as in all judicial and quasi judicial decisions, to those necessary to decide the matters over which we have proper jurisdiction. To the extent our findings do not detail every piece of evidence, or every nuance thereof, pointed out to us by appellant, it does not mean that we have not considered them. We have.

FINDINGS OF FACT

I. THE CONTRACT

Contract No. DAAG46-85-0026 was awarded, by what is now called the Army Materials Technology Laboratory (AMTL), to appellant on 30 March 1985. It was a cost plus fixed fee (CPFF) contract for the design and fabrication of a pilot facility for optimizing the process of electroplating titanium diboride on machine tools. The estimated cost for performance of the work was $230,520.00 which the contract stated "Shall constitute the estimated cost for the purpose of the Contract Clause entitled 'Limitation of Cost' FAR 52.232-20." The fixed fee for the contract work was $18,442.00 and was to be paid on each voucher in the same proportion as the voucher costs bore to the total estimated costs (8%) (R4, tab 1, p. 3). Thus, the total contract price as awarded was $248,962.00.

The referenced FAR clause provided in pertinent part as follows:

LIMITATION OF COST (APR 1984)

* * *

(b) The Contractor shall notify the Contracting Officer in writing whenever it has reason to believe that --

(1) The costs the contractor expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of the estimated cost specified in the Schedule; or

(2) The total cost for the performance of this contract, exclusive of any fee, will be either greater or substantially less than had been previously estimated.

(c) As part of the notification, the Contractor shall provide the Contracting Officer a revised estimate of the total cost of performing this contract.

(d) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause --

(1) The Government is not obligated to reimburse the Contractor for costs incurred in excess of (1) the estimated cost specified in the Schedule . . . .

(2) The Contractor is not obligated to continue performance under this contract (including actions under the Termination clause of this contract) or otherwise incur costs in excess of the estimated cost specified in the Schedule, until the Contracting Officer (i) notifies the Contractor in writing that the estimated cost has been increased and (ii) provides a revised estimated total cost of performing this contract. . . .

(e) No notice, communication, or representation in any form other than that specified in subparagraph (d)(2) above, or from any person other than the Contracting Officer, shall affect this contract's estimated cost to the Government. In the absence of the specified notice, the Government is not obligated to reimburse the Contract or for any costs in excess of the estimated cost . . .

(h) If this contract is terminated or the estimated cost is not increased, the Government and the Contractor shall negotiate an equitable distribution of all property produced or purchased under the contract, based upon the share of costs incurred by each.

Dr. Harold T. Couch, a PHD research scientist, the president of HTC, and his wife, Christine B. Couch, the secretary/treasurer (Govt. exh. 3, p. B-1), own 100% of appellant's stock (tr. 1/57). HTC Industries, Inc. was incorporated in August 1984 to commercially develop titanium diboride coating. Titanium diboride is an extremely hard material which can be electroplated on a number of

surfaces (tr. 1/58). The coating process originated at Hamilton Standard, a division of United Technologies, and the patent on the process was owned by an individual who worked at Hamilton Standard under Dr. Couch's Supervision (sic). Approximately $1,000,000 was spent on the research and about $100,000 of that came from the Army Materials Technology Laboratory (AMTL) according to Dr. Couch. The work had been abandoned by the time Dr. Couch decided to leave full time employment and establish HTC Industries, Inc. to pursue development of titanium diboride coatings as a business venture (tr. 1/126-128). Substantial commercial and military applications were foreseen and the intent was to advance the coating process to a point where it would be economically practical from a production and quality control standpoint (Govt. Exh. 3).

Paragraph C-1 of the contract Specification (sic) provided:

> C-1 GENERAL SCOPE
>
> C-1.1 Beginning with the effective date of contract and continuing for eighteen (18) months, the Contractor, as an independent contractor, and not as an agent of the Government shall furnish personnel, materials, equipment to manufacture and evaluate improved tools coated with titanium diboride. The program consists of two tasks associated with the techniques of scaled-up production of a pilot electroplating system and two tasks associated with the verification of current economic and performance projections:

Task I	-	Design and Feasibility Study of a Fused Salt Pilot Electrodeposition System
Task II	-	Fabrication of the Titanium Diboride Electrodeposition Pilot System and optimization of the process
Task III	-	Tool Production and Test
Task IV	-	Economic and Field Performance Analysis

Thirty days after award of contract, the contractor shall submit an implementation plan to the Contracting Officer for approval describing phase-in-timing of the technology developed in this project and its applicability to Army material systems, such as helicopters.

The pilot electrodeposition system (sometimes referred to as the facility), as more specifically described in the detailed scope provisions of the contract, was to be approximately 15' long X 9' wide X 8' high and was to meet other specific design requirements. Once approved by the Government in Task I, its fabrication was to begin under Task II. Although the contract required the approval to move from Task I to Task II to come from the contracting officer, appellant moved to Task II based upon the oral approval of the contracting officer's technical representative, Milton Levy, and appellant's vouchers continued to be paid. Based upon this Dr. Couch concluded that "after awhile, I

guess I believed Mr. Levy was the contracting officer" (tr. 1/67). During the performance of Task II, sometime during the first half of 1986, the appellant exceeded 75% of the estimated cost of the contract. No written notice to that effect was given to the Government at the time (tr. 1/33).

Bimonthly progress reports were due on the 15th of every other month (R4, tab 1, p. 8, C.3.2; CDRL AOO2, DATA ITEM DESCRIPTION, D1-A-5008). The progress reports were sent to the Contracts Division of AMTL, with a copy going to the contracting officer's technical representative, Mr. Levy (tr. 1/60). Appellant submitted no reports between 11 February 1986, a report covering the November/December, 1985 period (R4, tab 45, exh. 32), and 28 July 1986, a report covering the entire period of January/June, 1986 (R4, tab 45, exh. 33). The 11 February report indicated an expenditure rate of 57.76% as of 31 December 1985. The summary of that report advised that the time required to fabricate the pilot electrodeposition facility was going to over-run "in time" by two and half months. It also stated: "Contract costs are running fairly close to schedule, and are estimated to be within 10 percent of target." The 28 July report indicated that as of 30 June 1986 the expenditure rate had reached 98.55%. As of 30 June, the pilot electrodeposition system which was to have been fabricated in Task II was not yet assembled and operational (tr. 1/75). On 11 July 1986, Dr. Couch telephoned Mr. Levy. Prior to this time, as far as the record shows, there had been very little, if any, contact with Mr. Levy after award, other than to seek approval to move to Task II (tr. 1/61). Dr. Couch was a recognized expert and needed little technical direction (tr. 1/142; 2/84-85). Dr.

Couch advised Mr. Levy that appellant was running into substantial costs and an overrun was inevitable. Mr. Levy advised Dr. Couch that it was important to have the equipment operational and he should finish the wiring before doing anything else (tr. 1/61). Dr. Couch did not tell Mr. Levy how much the wiring would cost as he had not as yet prepared the cost estimate (tr. 1/137). The 28 July progress report advised that "there will be a substantial overrun" with the projected figures to be sent under separate cover. The appellant's letter forwarding the 28 July report ended with the following paragraph:

> We are happy to report, however, that all difficulties in the fabrication of the electrodeposition facility are apparently behind us. All major components and subassemblies appear to function according to original specification; and we anticipate initiation of the plating process optimization test matrix within the next calendar week.

On 12 August 1986, appellant forwarded a "Proposal for Contract Extension with Overrun", dated 11 August 1986, to the Contracts Division. It proposed a six month time extension and a contract price increase to $371,034.00 (R4, tab 45, exh.1).

On 12 August 1986, Dr. Couch also wrote a note to Mr. Levy stating:

> Please find inclosed (sic) a copy of the request for extension in time and overrun allowance as transmitted to the procurement people. I sincerely

regretted having to do this, but the monies involved are simply too large for me to "swallow". However now that performance is back under my "control" you can rest assured that I will spare no effort to redeem both of us. I will be looking forward to seeing you later this month.

(Govt. Exh. 5)

II THE CONTRACTING OFFICER'S TECHNICAL REPRESENTATIVE

Milton Levy was appointed as the contracting officer's technical representative (COTR) the day the contract was awarded to appellant. He did not hold a warrant as a contracting officer. Mr. Levy holds Bachelor's and Master's degrees in chemistry and has worked for the Government as a researcher or scientist for 40 years. A copy of the letter of appointment as COTR was sent to the appellant on 30 March 1985 by the contracting officer. The appointment letter contained two paragraphs particularly pertinent here which read as follows:

* * *

2. Your authority, under this appointment, authorizes you to take any and all actions, to the extent they are not specifically prohibited by the terms of the contract, which could lawfully be taken by the Contracting Officer; PROVIDED such actions DO NOT involve a change in price, quantity, quality, or delivery schedule.

* * *

7. Your attention is directed to Article 2 of the contract entitled "Limitation of Cost" which requires the contractor to notify the Contracting Officer if at any time he has reason to believe that the costs which he expects to incur in the performance of the contract in the next succeeding sixty (60) days, when added to all cost previously incurred, will exceed seventy-five percent (75%) of the estimated cost or if he has reason to believe that the total cost to the Government will be greater or substantially less than the estimated cost. Any information you may receive indicating a change in the estimated contract cost should be forwarded to the Contracting Officer for necessary action.

The forwarding letter of the contracting officer specifically highlighted Mr. Levy's lack of authority to issue changes that would involve a change in unit price, total contract price, quantity, delivery schedule, completion date or reporting requirements. In addition, the contract in Section G, "Contract Administration Data", contained the following:

G.2 TECHNICAL RESPONSIBILITY. The Procuring Contracting Officer shall designate in writing a Contracting Officer's Technical Representative (COTR) to act as his representative for technical matters under this contract.

NOTE: NO DIRECTION, INSTRUCTION OR INFORMATION, EMANATING FROM THE COTR, OR ANY PERSON EMPLOYED BY THE UNITED STATES GOVERNMENT, WHICH MAY MODIFY THE SCOPE OF WORK UNDER THIS CONTRACT, CHANGE THE ESTIMATED COST OF THE WORK UNDER THE CONTRACT, OR TIME OF PERFORMANCE THEREUNDER, SHALL BE BINDING ON THE GOVERNMENT UNLESS A PRIOR AUTHORIZED INSTRUMENT OR MODIFICATION TO THIS CONTRACT IS DULY ISSUED BY THE CONTRACTING OFFICER.

III. THE LEVY CONVERSATIONS

There is direct conflict in the testimony with respect to what Mr. Levy told Dr. Couch by way of inducing appellant to continue work despite its overrun position.

Some of the conflict centers around the dates of certain conversations. As to this we accept Dr. Couch's dates as more likely. A number of years have passed since the conversations took place. The Government has conceded Mr. Levy was mistaken on some dates. Mr. Levy had many matters he was attending to at the time. Dr. Couch had one matter paramount to him at the time; this contract. While we accept Dr. Couch's dates we do not attach the significance he does to the date mistakes in terms of value in showing Government "perjury" and bad faith.

With respect to the substance of the conversations, we observe that the two principal witnesses, Dr. Couch and Mr. Levy, and to a certain degree Dr. Kirit Bhansali who worked with Mr. Levy, cannot really be classified as disinterested witnesses. In its barest form the conflict centers about whether Mr. Levy instructed Dr. Couch to continue work on the assurance Mr. Levy would find the money.

The first significant conversation with Mr. Levy, after the July progress report and August proposal for a time extension and cost overrun, took place on 17 September 1986. Mr. Levy cannot recall this phone call but does recall being out of town on that date. Evidence to establish the latter fact is not convincing but we consider the date immaterial. Mr. Levy admits talking to Dr. Couch on 19 September 1986 in order to set up a meeting at HTC on 1 October (tr. 2/92). Mr. Levy's testimony is that he told Dr. Couch "that work should be stopped and that any work that he proposed continuing would be at his own expense" (tr. 2/94). Dr. Couch's recollection of the September phone call is that Mr. Levy told him "don't worry about it. Just keep on going. I will find the money" (tr. 1/67).

The second significant conversation took place on 1 October 1986 at the HTC plant in Chicopee, Massachusetts. This was the first, and only, visit Mr. Levy made to the site of the work (tr. 1/78). Mr. Levy admits telling Dr. Couch he would attempt to find money (tr. 2/104) but denies telling him to continue the work (tr. 2/105). He brought with him Dr. Kirit Bhansali, an AMTL scientist who had technical expertise in the area and who had reviewed the HTC

technical reports. Dr. Bhansali was under the impression that there was still some money left in the contract at that time but when Dr. Couch advised them that there had been a $10,000 cost overrun for July and August 1986 he recollects hearing Mr. Levy telling Dr. Couch not to spend any more money on the contract (tr. 3/65). He also remembers that on the way to lunch, the subject of money again came up and Mr. Levy advised there were serious budget problems and he had to look after his own people first to which Dr. Couch responded that he could understand that (tr. 3/71). Mr. Levy's recollection is that he advised Dr. Couch that continued work was at "your own risk and your own cost" (tr. 2/102).

Dr. Couch's recollection is quite different. He wanted to speak to Mr. Levy out of hearing of Dr. Bhansali because he "didn't know if Dr. Bhansali was a party to Mr. Levy finding money" (tr. 1/78). To that end he asked his assistant, Igor Gertsenzon, to keep Dr. Bhansali busy while he talked to Mr. Levy, a fact supported by the affidavit of 21 October 1989 of Mr. Gertsenzon (R4, tab 45, exh. 28). Mr. Levy concedes that Dr. Couch wanted to talk to him privately regarding the overrun but recollects that Dr. Bhansali was also there during the discussion of money (tr. 2/99-101). The Gertsanzon (sic) affidavit also attests that Mr. Gertsanzon (sic) heard Mr. Levy tell Dr. Couch to "keep going but don't submit any more invoices until I find the money." These are the words Dr. Couch remembers also (tr. 1/149; R4, tab 45, exh. 27). Dr. Couch had submitted vouchers for July and August 1986 and these were never paid (R4, tab 22; tr. 1/71, 79).

The testimony is generally in agreement that there were extensive technical discussions at the 1 October meeting (tr. 1/82; 3/68). What came out of the meeting was that appellant furnished the Government with samples of coated drill bits and coated flat samples for testing at AMTL (tr. 1/150; 2/102, 114, 175). Appellant's first attempt at producing a plating after the electrodeposition facility was finally assembled had taken place in September 1986 (tr. 1/75).

It is clear that both Dr. Couch and Mr. Levy had a scientific interest in ascertaining if the electrodeposition process would be successful. Dr. Couch had a great deal to gain financially as far as future business opportunities if the process proved to be commercially adaptable, (sic) If the AMTL tests showed that appellant had been able to "optimize" the coating process, the chances of Mr. Levy being able to obtain money for the program would have been enhanced (tr. 3/33).

On 13 November 1986, Mr. Levy called Dr. Couch to discuss the samples furnished for AMTL testing. A problem caused by air getting into the plating process resulted in appellant sending a part of the electrodeposition facility out to be repaired and a meeting was set up for 16 January 1987 with AMTL technical people in the hope that better samples could be furnished (tr. 1/83, 84, 150). Mr. Levy advised Dr. Couch during the phone call that he was still "working" on the money problem (tr. 1/83).

At the January meeting no one from the Contracts Division was present. Dr. Couch brought plated specimens

with him at Mr. Levy's request. Mr. Levy understood it to be voluntary (tr. 2/111). Dr. Couch understood it to be required (tr. 1/84, 160). Three of the bits furnished were coated and the AMTL technical people needed additional uncoated samples from the same production lot to do comparative sampling (tr. 2/113), which appellant sent on 23 January 1987 (R4, tab 45, exh. 6). The uncoated samples had been part of the materials for which appellant had been paid under the contract (tr. 2/28).

Dr. Couch's assistant, Mr. Gertsanzon (sic), worked part time for HTC from June 1985 until April 1986. He was rehired in mid-September 1986 when Dr. Couch told him the Army had agreed to support continuation of the work and let go in February 1987. At that time, Dr. Couch told him that it didn't look like Mr. Levy was going to find any money after all (R4, tab 45, exh. 28).

During the period May 1986 to March 1987, Dr. Couch had some communication with a Professor Weiss of Kings College, London, a former AMTL scientist aware of the process, who was working for a company he felt would support a development program for the titanium diboride electroplating if the samples showed promise (R4, tab 45, exh. 31, a, b, c, d & e). On 20 February 1987, Dr. Couch wrote to Professor Weiss advising him of the technical problems he had encountered and sending him a sample for testing. Dr. Couch advised that the sample had a tendency for spallation (sic) on the edges and expressed the opinion that this was symptomatic of more serious problems which required "some heavy analytical testing" which he terned

(sic) a "relatively expensive proposition." The letter also contained the following informative advice:

> I was finally able to get Milt Levy off the hook - i.e. the development was considerably behind schedule and over budget - by delivering some plated tools which at least appeared credible, and he is doing what he can to help on the analytical end. On the financial end however we may both be stymied as Congress appears to have substantially pared both the '87 and '88 DoD budgets, and as you well know the impact on R&D funds is disproportionately amplified. Therefore if you still have a client who is interested in chasing the development of TiB2 we should all be talking to him.

(R4, tab 45, exh. 31f)

Professor Weiss replied on 6 March 1987 thanking appellant for the sample and "your sad tale of woe" and indicated he would do some tests before deciding what to do next (R4, tab 45, exh. 31g). There were no further communications (tr. 2/60). Appellant sees this as evidence of influence by Mr. Levy which we find highly speculative in view of the technical difficulties which alone could have been responsible for Professor Weiss' lack of follow up. The correspondence does indicate quite clearly however, that at least as of 20 February 1987 Dr. Couch was not operating under any illusion that reimbursement was to be expected.

In February 1987, the Defense Contract Administration Management Services Office came in to do a survey of

Government hardware in appellant's possession. They were satisfied with the manner in which the appellant was maintaining the Government property (tr. 1/87-88). This appears to have been a routine action taken by DCAS in carrying out their Government property responsibilities. In any event, there is no showing the contracting officer was involved.

A second meeting with AMTL technical people was set up by Mr. Levy for 12 March 1987 by phone call to Dr. Couch. Dr. Couch is not sure whether Mr. Levy assured him that he was still working on the money problem. As he put it "at any rate, I wasn't completely believing it anymore (sic), but I didn't have anything to lose, as I saw it, to go to one more meeting. And so I went to the meeting" (tr. 1/91). Previous to this phone call, Dr. Bhansali had called Dr. Couch to get technical information on the plating process and they had talked for 20 to 30 minutes (tr. 1/91) (sic)

Mr. Levy asked Dr. Couch to bring some coated samples to the 12 March 1987 meeting (tr. 1/92). At the meeting Mr. Levy asked him for more samples because the bits he had previously given did not appear to be top quality and there weren't enough to complete the tests AMTL was attempting to run (tr. 2/29). This did not come to pass because within two days of that meeting the electrodeposition system regulator failed and the system suffered extensive damage (tr. 1/93). At the time of the damage incident, according to Dr. Couch, the Government had reimbursed him for only about 2/3 of the cost of the facility (tr. 1/94). He supplied a damage report on the electrodeposition system at the request of Mr. Levy (tr. 1/94). Appellant was not

instructed by anyone at AMTL to repair the electrodeposition facility, nor did he seek permission to do so but, on his own, repaired it in late 1987 (R4, tab 45, exhs. 7, 37) in anticipation of a Connecticut grant to continue the work in conjunction with the University of Connecticut (R4, tab 22).

Dr. Couch had some technical conversations with Dr. Bhansali in late April and met him on 7 May 1987 at his Chicopee plant to go over the damage report (tr. 1/96). Dr. Couch went to work for Pratt & Whitney in April 1987 (tr. 1/181), and was working on a full time assignment at the time of the Bhansali visit (tr. 1/95).

Our evaluation of the conflicting testimony, when taken in conjunction with the rest of the evidence of record, leads us to the following conclusions. Mr. Levy encouraged Dr. Couch to continue work to supply samples and cooperate with AMTL efforts to find out how close the process was to being optimized, an end also much in the interest of Dr. Couch's business hopes. We further find that Mr. Levy encouraged Dr. Couch to believe Mr. Levy could find the money to continue the work. However, we can not find that any guarantees were given by Mr. Levy and we find Dr. Couch either knew or should have known that. Dr. Couch sent in no further bimonthly progress reports. His desire to keep the subject of obtaining further money between himself and Mr. Levy and his failure to follow up with the Contracts Division in writing, or refer to the money problem in such correspondence as he had with Mr. Levy, is more indicative of a hope he placed in a fellow scientist than a promise made by the contracting officer. This is especially so since Dr. Couch was admittedly aware of the express written

limitations on Mr. Levy's authority, as well as the specific terms of the "Limitation of Cost" clause. We cannot give much weight to his later stated opinion that he probably thought that Mr. Levy was the acting contracting officer since that involved his making an unreasonably broad assumption based solely upon lack of direct communication from the contracting officer. Finally, we find that Mr. Levy had no authority to act as a contracting officer, or for a contracting officer, in authorizing overruns, and we find no ratification by any contracting officer in his so doing, even assuming arguendo that he did.

IV. THE CONTRACTING OFFICER

The role of the contracting officer in all of this, as far as the evidence shows, was barely visible. The contracting officer who signed the contract, Diana Tully, had apparently left in May 1986. At that time there were still two contracting officers, Barbara Gelaznik and Jim Walsh (R4, tab 49). Ms. Gelaznik sent a memo to Mr. Levy on 5 August 1986 with apparent reference to appellant's 28 July progress report, asking Mr. Levy whether HTC's reasoning for the anticipated six month delay had merit and whether Mr. Levy agreed that the fabrication difficulties were unforeseen (app. exh. 4). She wrote a second memo to him on 1 September 1986 asking him to review the appellant's proposal regarding a time extension and cost overrun and to advise her by 15 September 1986, reminding him she had not had a response to her earlier request. Mr. Levy testified he never responded to either request (tr. 2/143). In early August 1986, Dr. Couch had called the AMTL Contracts Division and talked to Andrew DeVita, a contract specialist

assigned to this contract (tr. 2/58). Mr. DeVita advised him that no contracting officer had been assigned to the subject contract and to address correspondence to one Jackie Hart of the AMTL Contracts Division (tr. 2/60). After appellant's 12 August 1986, "Proposal for Contract Extension with overrun," which was addressed to Jackie Hart, with copies to Mr. DeVita and Mr. Levy, there was no further correspondence to, or from the Contracts Division, during the critical period of continued performance by the appellant. Nor is there any showing that Mr. Levy, or anybody else on the technical side of AMTL dealing with Dr. Couch, kept the Contracts Division advised of what was going on (tr. 2/139; 3/43). The evidence indicates that the AMTL Contracts Division did not closely monitor this contract and that the AMTL technical people did not coordinate their actions with the contracting officer. We find no conspiracy between the contracting officer and Mr. Levy.

The Government does not dispute appellant's evidence that the contracting officer never sent appellant the written notice provided in FAR 32.704. That sections provides:

FAR 32.704 Limitation of cost or funds.

(a)(1) When a contract contains the clause at 52.232-20, Limitation of Cost; 52.232-21, Limitation of Cost (Facilities); or 52.232-22, Limitation of Funds, the contracting officer, upon learning that the contractor is approaching the estimated cost of the contract or the limit of the funds allotted, shall promptly obtain funding and programming

information pertinent to the contract's continuation and notify the contractor in writing that -

(i) Additional funds have been allotted, or the estimated cost has been increased, in a specified amount;

(ii) The contract is not to be further funded and that the contractor should submit a proposal for an adjustment of fee, if any, based on the percentage of work completed in relation to total work called for under the contract;

(iii) The contract is to be terminated; or

(iv)(A) The Government is considering whether to allot additional funds or increase the estimated cost, (B) the contractor is entitled by the contract terms to stop work when the funding or cost limit is reached, and (C) any work beyond the funding or cost limit will be at the contractor's risk.

V. FURTHER EVENTS LEADING TO APPEAL

In September 1987, AMTL published a technical report, approved for public release, relating to the electro-deposition of titanium diboride on high speed twist drills (app. exh. 13). Mr. Levy and Dr. Bhansali, along with two others at AMTL, were co-authors of the report. There is no evidence to show that the contracting officer was involved in, or even aware of, the publication. The report contained information given by Dr. Couch, or derived from the

samples given by him, after funding ceased (tr. 1/98). Dr. Couch asserts that he was unaware of the report until it was furnished to him in 1991 in response to discovery on this appeal. The report revealed that there had been an impurity, silicone, in the plating samples Dr. Couch had furnished under the instant contract. Since he had never been informed of that finding, Dr. Couch thought it possible that Mr. Levy did not wish him to succeed on the contract (tr. 1/90, 165).

A meeting was held at AMTL on 5 February 1988 with Dr. and Mrs. Couch, Mr. Levy, and Mr. Alex Navrez in an effort to negotiate a possible settlement. Mr. Navrez was a contract specialist in the Contracts Division but did not possess final authority to bind the Government. A tentative agreement was worked out whereby appellant was to keep the electrodeposition facility and forego any other claims (app. exh. 1; tr. 1/102). Dr. Couch's estimate is that at the time the Government had reimbursed him for approximately two-thirds of the cost of the facility (tr. 1/102). Dr. Couch understood Mr. Navrez did not have the final say and that approval had to be obtained from his superiors (tr. 1/177-179). That approval was never obtained and, on 12 April 1988, a Notice of Termination of the Contract for the Government's Convenience was issued under the "Termination (Cost Reimbursement) (April 1984)" clause found at FAR 52.249.6 (R4. tab 11). On 13 May 1988, the termination was replaced with one setting the termination date as 13 May 1988 (R4, tab 12). The termination notice contained 2 1/2 pages of instructions on actions appellant was to take and implied the need for a termination settlement

proposal. After receipt of the termination notice, appellant retained an attorney (R4, tab 13).

In the summer of 1988, appellant developed a Business Plan for the production of "titanium metal" and for the titanium diboride coating process which put forth a substantial business potential (Govt. exh. 3). The Business Plan noted that HTC Industries, Inc., anticipated receiving a settlement of approximately $100,000 on the subject contract with AMTL.

Appellant's attorney submitted a certified settlement proposal under the "Termination" clause on 23 September 1988 seeking $195,252.81 (app. exh. 2). This was ultimately to be allowed by the Termination Contracting Officer (TCO) in August 1989, only in the amount of $6,107.47, the difference between what appellant had been paid and the contract limit of $248,962.00 (R4, tab 40). In the interim, appellant's attorney attempted to obtain the electrodeposition facility for appellant's use (R4, tabs 15, 18). Appellant had hopes of entering into a contract with the University of Connecticut with the aid of a $100,000 grant from the State of Connecticut (tr. 1/107-08). In late October 1988, the TCO advised appellant that the electrodeposition facility could not be used (R4, tab 16). The TCO recognized the requirement under paragraph (h) of the "Limitation of Cost" clause to "negotiate an equitable distribution of all property purchased or produced under the contract based upon the share of costs incurred by both" but considered the property nonseverable and not possible of equitable distribution (R4, tab 16). Dr. Couch then withdrew from the University of Connecticut project (R4,

tab 45, exh. 20) and advised the TCO that he no longer had any interest in acquiring the facility as he would have no place to keep it after January 1989 (R4, tab 18). In early January 1989, the TCO advised appellant the Government was willing to make the facility available to the University of Connecticut to do further research (R4, tab 45, exh. 21). Appellant, through its attorney, advised it would not consent to doing so, and instead requested action on its settlement proposal (R4, tabs 19, 20).

A new Procurement Contracting Officer (PCO), Mary Pemberton, had been assigned to the subject contract in September 1988 (tr. 3/105). There was a meeting with appellant's attorney in March 1989 and further correspondence in the following months all related to the dispute over funding of the overrun (R4, tabs 23, 24, 27, 30, 31, 34, 38, 45, exhs. 17, 25, 30, 36, 37). In early May 1989, appellant's attorney expressed dismay at the time it was taking to obtain a determination on appellant's September 1988 termination for convenience settlement proposal and referenced § 605 of the Contract Disputes Act regarding the duty of the contracting officer to issue a decision (R4, tab 45, exh. 17). The PCO advised him that section applied to claims filed under the Disputes clause, not to termination settlement proposals and invited attention to the FAR procedures for disputes and appeals (R4, tab 30).

A Government offer that appellant keep the electro-deposition facility but be paid only the balance remaining on the amount funded (R4, tabs 31, 45, exh. 23) was unacceptable to appellant who asked the Government to pick

up the inventory (R4, tabs 31, 45, exh. 23), which it did in mid July 1989 (R4, tab 38).

As previously indicated, the determination on the September 1988 termination settlement proposal was issued by the TCO on 10 August 1989 allowing appellant only the difference between what it had been paid and the contract price of $248,962 (R4, tab 40). In that determination the TCO stated:

> Even though it is the government's position that because the item is nonseverable, ownership rests with the government, in an attempt to settle this termination an offer was made to the contractor allowing them to have title to all the inventory. This offer was rejected. The inventory was therefore disposed of through the plant clearance process.

The determination advised the appellant of its right, should it disagree, to submit a claim to the contracting officer under the "Disputes" clause. At the time the determination was issued it appears that appellant was no longer represented by an attorney.

On 7 November 1989, appellant submitted a certified claim to the TCO for "Equitable Adjustment" under the "Changes - Cost-Reimbursement (Aug 1987)" clause (FAR 52.243-2) seeking $2,180,241, based upon Mr. Levy's alleged instructions to continue working and failure of the contracting officer to respond to appellant's overrun notice and proposal for a contract extension (R4, tab 45).

The claim was broken down by appellant as follows:

1.	Overrun and Contract Termination Expense	.....$ 342,937.
2.	Loss of equity associated with Bankruptcy (loan plus interest in favor of the Couch's (sic))	..... 407,534.
3.	Loss of equity HTC common stock purchased	..... 3,100.
4.	Forced abandonment of an awarded Contract by the Connecticut Department of Higher Education	..... 100,000.
5.	Loss of $2,630,000. in capitalization opportunity as represented in HTC Business Plan dated Aug. 31, 1988 (valued @ 50% funding probability)	.....1,315,000.
6.	Cost of Business Plan preparation - Accounts payable Peat Marwick, Cummings & Lockwood etc.....	11,670.
	Total Amount of Claim under DAAG46-85-C-0026	$2,180,241.

The contracting officer's decision denying the claim was issued on 7 March 1990 and a timely appeal followed.

PRELIMINARY MATTERS AND MOTIONS

I. STANDING

Approximately three weeks prior to the trial, the Government advised the Board that it understood that the State of Connecticut had dissolved HTC's corporate status for failure to file bi-annual reports. The Government further advised it understood that the appellant had filed for Chapter 7 bankruptcy on 28 September 1990. However, Dr. Couch responded that HTC Industries, Inc. had never filed for bankruptcy at any time but simply closed its doors and gone out of business in August 1989. Dr. and Mrs. Couch, the sole stockholders in HTC, had filed for personal bankruptcy. Dr. Couch stated that the United States Bankruptcy Court for the District of Connecticut allowed he and his wife "to retain a 100% unencumbered interest in HTC Industries, thereby confirming Dr. and Mrs. Couch's legal standing in the instant matter".

Later documents furnished the Board by Joel Grafstein, Esq., the Couch's (sic) attorney in the bankruptcy proceedings, indicated that Dr. and Mrs. Couch filed for personal bankruptcy under Chapter 13 on 29 September 1990. Their petition listed, under paragraph 14 "Personal Property," the item "Couch v. Army, ASBCA No. 40562" with a market value of $2,000,000.00. The "Chapter 13 Plan" filed with the Bankruptcy Court on 12 October 1990 at paragraph 7 stated:

* * *

7. In addition to any payments to be made hereunder, the Debtor has a claim against Army A.S.B.C.A. #40562. Any recovery shall be divided among the creditors, after the payment of any expenses of litigation, plus interest at 8% per annum.

The attorney's letter also advised that the Chapter 13 Bankruptcy case was later converted to a Chapter 7 Bankruptcy case and attached a Bankruptcy Court order indicating this took place on 19 March 1991. He also advised that "in all instances the Couch's (sic) claim against the Army had been claimed as exempt" and enclosed a blank copy of the pleading filed with the court setting forth the exemption. The Government copy of that pleading shows it to have been dated 29 July 1991. The pleading is an amendment to the Chapter 7 Bankruptcy Petition to change the paragraph 14 listing of personal property to read "Couch v. Army ASBCA #40562. Fair market value is unknown. Property claimed exempt under 11 U.S.C. 522 (d)(1) and (5)." We note that (d)(1) refers to an interest, not to exceed $7,500, in property used as a residence, or in a burial plot and, (d)(5) refers to an additional property exemption not to exceed $400.

Because of the question raised by these documents and the importance of establishing that Dr. and Mrs. Couch had standing to pursue the appeal on behalf of HTC, a conference call between Dr. Couch, Lt. Col (sic) Totten and the assigned judge was held on 27 March 1992 and Col (sic) Totten thereafter contacted the Bankruptcy Trustee. The Trustee advised that he had allowed the Couchs to litigate

this claim but wished to be advised if they should prevail as he considered he owned the rights in the matter (tr. 1/42). The Couchs strongly disagree that the Trustee has any rights remaining, based upon advice of their attorney in the Bankruptcy proceedings (tr. 1/43). However, the Government expressed its consent to go forward with the trial based on the Trustee's authorization to the Couchs (tr. 1/47-48).

With respect to the dissolution of HTC, Inc., the General Statutes of Connecticut at § 33-378, "Effect of Dissolution", subparagraph (e) provide that:

> (e) any action or proceeding by or against a dissolved corporation may be prosecuted or defended by the corporation in its corporate name, and such use of the corporate name is also available to a shareholder prosecuting or defending in a derivative capacity on behalf of a dissolved corporation.

The Connecticut case law recognizes this right. River Dock and Pile, Inc. v. O. and G Industries, Inc., et al., 219 Conn 787, 595 A.2d 839; Don Rich Corporation v. Richard Rossini, et al., 1 Conn. App. 120, 468 A.2d 1273.

On the basis of the above, the Board concludes, as did the presiding judge at the trial, that there is no obstacle to the standing of Dr. and Mrs. Couch to pursue the subject appeal on behalf of HTC. Whether any monies appellant might be ultimately found entitled to belong to the Bankruptcy Trustee is not a matter for our jurisdiction.

II. GOVERNMENT MOTION TO DISMISS

Appellant's complaint, as amended, contains four separate counts, the first three of which in effect allege Government authorization for appellant to continue working despite the overrun, and the fourth alleges breach of contract and bad faith. The "Breach of Contract and Bad Faith" count includes subheadings of:

.extreme lack of timeliness (3 years)
.fraud
.perjury
.theft of intellectual property
.falstification (sic) of evidence
.loss, suppression, or destruction of other evidence

The Government has filed a motion to dismiss certain portions of the appeal as beyond the Board's jurisdiction. It contends that, as to appellant's claims related to fraud, perjury and theft of intellectual property, we have no jurisdiction because 1) these claims were never presented first to the contracting officer for decision under the Contract Disputes Act (CDA), and 2) we lack subject matter jurisdiction of such matters.

The Board's jurisdiction arises under the Contract Disputes Act of 1978, (CDA) 41 U.S.C. §§ 601-613. We have no jurisdiction under the CDA over criminal matters or matters sounding purely in tort. As we said in Asfaltos Panamenos, S.A., ASBCA No. 39425, 91-1 BCA ¶ 23,315:

Under the provisions of the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, the Board "is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Claims Court." The Tucker Act, 28 U.S.C. § 1491, confers jurisdiction upon the Court of Claims (now the Claims Court) to hear "any claim against the United States founded . . . upon any express or implied contract with the United States . . . in cases not sounding in tort."

The only exception under the Tucker Act is if the purported tort relates to or arises out of an express or implied contractual obligation. Chain Belt Co. v. United States, 115 F. Supp. 701 (Ct. Cl. 1953) (Court of Claims had jurisdiction over alleged tort committed by the Government while in performance of contractual duty to remove equipment from manufacturing plant); Kolar, Inc., ASBCA No. 28482, 84-1 BCA ¶ 17,044 (ASBCA had jurisdiction over appeal because alleged tort [fraud] was not independent of the contract).

The "fraud" and "perjury" elements in appellant's complaint and as set forth in its post hearing brief, relate to the alleged Government "breach of contract and bad faith" rather than being independent claims as such. They are in effect characterizations of how appellant views the Government's handling of the overrun. As such they are subsumed in its claim to the contracting officer and we have jurisdiction. Insofar as appellant's allegations of fraud and perjury relate to, or constitute, elements of proof for its

breach of contract claim the Government's motion to dismiss for lack of subject matter jurisdiction is therefore denied. We have taken into account appellant's evidence related to these allegations in arriving at our findings on the breach claim. Insofar as any of these allegations might be taken as a basis for tort claims apart from the contract they are dismissed as beyond our jurisdiction.

The "theft of intellectual property" element relates to the use of information supplied by appellant in the AMTL September 1987 technical report. That is a matter never presented to the contracting officer for decision. Since a contractor's claim to the contracting officer is the linchpin of our jurisdiction under the CDA, we have no jurisdiction of this claim and it must be dismissed. Ball, Ball, & Brosamer v. United States, 878 F.2d 1426 (Fed. Cir. 1984); Paragon Energy Corp. v. United States, 645 F.2d 966 (Ct. Cl. 1981); Reinhold Construction, Inc., ASBCA Nos. 33312, 33313, 33552, 37052, 92-3 BCA ¶ 25,031.

Accordingly, the Government's motion to dismiss is granted only to the extent above indicated. The facts in evidence and appellant's arguments, in relation to the above allegations in its complaint, are properly before the Board to the extent they relate to the breach claim over which we have unquestioned jurisdiction.

Appellant filed post-hearing motions to strike certain evidence from the record because of inconsistencies. These go to the weight rather than the admissibility of the evidence. The motions are denied. The Board has taken

appellant's arguments into consideration in weighing that evidence.

With respect to the allegations of timeliness (delay in issuing a final contracting officer decision), falsification of evidence, and loss, suppression, or destruction of evidence the Government concedes these allegations could have relevance to the contractual dispute. Its initial contention that these allegations should be dismissed for lack of specificity seems to have been abandoned in its post hearing brief. With specific respect to the timeliness allegation, we find that the time between receipt of appellant's certified claim in November 1989 and the issuance of the contracting officer's decision in March 1990 was not unreasonable under the circumstances. However, to the extent that all of the allegations made the subject of the Government motion to dismiss may relate to the credibility of the evidence we have given them full consideration in arriving at our findings of fact.

DECISION

The question before us is whether the appellant has established a valid claim under federal contract law. To do so it must show the claim flows from one or more of the terms of a contract with the Government, or from the Government breach of a contract. To decide this issue we must apply certain well established principles of federal contract law which are binding upon us and which control the result we reach.

As indicated in our findings it is clear to us, and should have been to the appellant, that the COTR, Milton Levy, had no authority to authorize Government reimbursement for overrun work. The written delegation of his authority and the contract itself, both in the Limitation of Cost clause and clause G-2, "Technical Responsibility," could not have been clearer on this point. Not only was there absolutely no obligation upon appellant to continue performance but "no notice, communication, or representation in any form" other than a written notice from the contracting officer would satisfy the LOC clause precondition to obligating the Government. We need go no further to conclude that the conditions for recovery under the LOC clause of the contract have not been met. However, appellant alleges Government "bad faith" and breach of contract in connection with the overrun situation. These allegations relate not to the Government's failure to carry out the express written terms of the contract, but rather to an alleged new agreement which the Government either entered into with appellant, or should be precluded from denying. Therefore, we look at these allegations within the confines of our CDA jurisdiction, in the nature of claims based upon an implied in fact contract or upon a waiver/estoppel theory.

The Board has no jurisdiction over claims based on "implied-in-law" contracts, where by fiction of law a promise is imputed to pay money. It does have jurisdiction over contracts "implied-in-fact." However, basic requirements for establishing the existence of an implied-in-fact contract are no less than for an express contract. As we recently held in Eaton Corporation, ASBCA No. 38386, 91-1 BCA ¶23,398 at 117,402:

> . . . . Such a contract arises where there is a meeting of the minds inferred from the conduct of the parties. The source of the mutual obligation is the intent of the parties. An implied-in-fact contract requires the same elements as an express contract, i.e., an offer, acceptance and consideration. Fincke v. United States, 675 F.2d 289 (Ct. Cl. 1982); Algonac Mfg. Co. v. Mfg. Co (sic) v. United States, 428 F.2d 1241 (Ct. Cl. 1970). Where the Government is a party the meeting of the minds must be inferred from the conduct of persons having actual authority to contract on the Government's behalf. Lack of authority is an absolute bar to applying the principles of implied-in-fact contract, regardless of the degree of encouragement or even acceptance of completed work by the Government employees involved. Vec-Tor, Inc., ASBCA Nos. 25807, 26128, 84-1 BCA 17,145, on motion for recon., 85-1 BCA 17,755, affirmed, 4 FPD 61 (Fed Cir. 1985).

We find particularly pertinent to this appeal the caution of the United States Supreme Court in Federal Crop. (sic) Insurance Corporation v. Merrill, 332 U.S. 380, 384 (1947) that:

* * *

> Whatever the form in which the government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.

We consider the record clear, as previously indicated, that Milton Levy had no actual authority, either express or implied, to bind the Government to fund an overrun and the evidence does not permit our finding that any contracting officer knew, or should have known, that the appellant was promised additional Government funding and was expending funds in reliance thereon. There is simply insufficient evidence to conclude that there was a ratification by a Government official with actual authority of any commitment made by Mr. Levy to Dr. Couch. Thus, we cannot conclude that a valid implied-in-fact contract ever came into being.

Appellant contends that the failure of the contracting officer to follow FAR 32.704 and send a written notification to HTC entitles it to relief. There is no showing that the failure to follow FAR here was coupled with actual or constructive knowledge by the contracting officer of continued contractor performance induced by Government representatives. Thus, we do not see the failure to send a written notice as a complicity with, or ratification of, any otherwise unauthorized actions of the COTR. Further the FAR provision does not bestow an independent right upon the contractor from which a breach claim would flow. To construe it as permitting a contractor to continue performance at Government expense absent written notice from the contracting officer would fly in the face of the "Limitation of Cost" clause in the contract. As we said in Falcon Research Development Co., ASBCA No. 26853, 87-1 BCA ¶ 19,458; aff'd 831 F.2d 1056 (Fed. Cir. 1987).

* * *

> The clause does not require the CO to fund the overrun. If no response is received from the CO, the contractor is entitled to stop work when the allotted funds have been used up. The burden of deciding to stop work, or in the alternative, to continue, with the risk that the overrun may not be funded, rests ordinarily with the contractor. A Government response to the contractor's notice under the clause is not required. . .

To the extent appellant would have us find an actionable breach of contract in the extended negotiations in an effort to resolve the overrun and the time it took the contracting officer to issue a decision from which an appeal could be taken, the facts do not support our so concluding.

Nor is recovery under an estoppel approach to relief available to appellant in this appeal. That principle requires meeting certain conditions.

> Four elements must be present to establish an estoppel: (1) the party to be estopped must know the facts, i.e., the government must know of the overrun; (2) the government must intend that the conduct alleged to have induced continued performance will be acted on, or the contractor must have a right to believe the conduct in question was intended to induce continued performance; (3) the contractor must not be aware of the true facts, i.e., that no implied funding of the overrun was intended; and (4) the contractor must rely on the government's conduct to its detriment, Hughes Aircraft Corporation, 83-1 BCA at

81,516; see United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970); Emeco Industries, Inc. v. United States, 485 F.2d 652, 657, 202 Ct. Cl. 1006 (1973).

American Electronic Laboratories v. United States, 774 F.2d 1110, 1113 (Fed. Cir. 1985) (sic)

As was pointed out in Essen Mall Properties v. United States, 21 Cl. Ct. 430, 446 (1990):

> A fifth element of equitable estoppel was identified in City of Alexandria, supra [3 Cl. Ct. 667, 679 (1983), rev'd on other grounds 737 F.2d 1022 (Fed. Cir. 1984)]: "In order to estop the Government, the conduct or representations relied upon must be made by government officers acting within the scope of their authority." City of Alexandria, supra, 3 Cl. Ct. at 679 (citing Jackson v. United States, 216 Ct. Cl. 25, 41, 573 F.2d 1189, 1197 (1978); see also Miles Farm Supply, supra, 14 Cl. Ct. at 757.

See also our decision in Hughes Aircraft Corporation, ASBCA No. 24601, 83-1 BCA ¶ 16,396 at 81,517 where we held directions by unauthorized agents could not act as a waiver:

> Even assuming that the Government technical directions concerning the work otherwise reasonably might be construed as a waiver by the contractor, here virtually all such directions were given by

> persons without authority to waive the contract's funding limitations. Only the performance inducing conduct of agents with the power to authorize the funding of overruns may be construed as waivers. The conduct in question, purportedly relied on as encouraging continued performance despite the overrun, must be within the scope of the Government agent's authority. [Citations omitted]

As our findings detail, although appellant sent its overrun proposal to the Contracts Division in August 1986 it engaged in no further correspondence with that office during the time it was submitting samples to Mr. Levy. It sent in no bimonthly reports. It sent in no follow up to its overrun proposal dispite [sic] the fact it was concerned about the lapse of time without reponse from the contracting officer. In view of Mr. Levy's lack of authority, and our doubts about just how positive Mr. Levy was in his "promises" to appellant, we cannot conclude that under the circumstances here involved, he could fill the role of the Government for purposes of meeting the tests set forth above. Moreover, we are mindful of the present thinking of the United States Court of Appeals for the Federal Circuit, that:

> It is also not entirely clear whether the defense of estoppel is still available against the government in light of the Supreme Court's decision in OPM v. Richmond, ___ U.S. ___, 110 S. Ct. 2465, 110 L. Ed. 387 (1990), which held that, absent fraud by the government, estoppel could never be asserted against it in suits to compel the payment of money from the

> public treasury in contravention of eligibility requirements contained in an Act of Congress. Public monies are unquestionably involved here, although statutory eligibility requirements are not.

Jana Inc. v. United States, 936 F.2d 1265, 1270 (Fed Cir. 1991).

The cases cited by appellant which have granted relief are either inapplicable or distinguishable on their facts.

What this case represents is a classic example of why contracts are put in writing. We have a contractor inexperienced in Government contracts but with a strong business incentive to continue the work after Government funding ran out. We have a Government scientist also with a strong incentive to see the research completed, but without authority to bind the Government, attempting to find a way to obtain additional funding. We have a contracting officer who is not kept informed by either. Had the samples submitted by Dr. Couch established that the coating process had been optimized and had Mr. Levy been able to find additional funding, both would have been singing each others praises. As it is, neither result was achieved and appellant was faced with considerable actual, and potential, losses. Who must bear the risk for this is set forth in the contract and applicable law governing such situations. We are not unsympathetic to the appellant but under the applicable law, we have no alternative but to conclude that the appeal must be denied with two relatively minor exceptions.

The first has to do with the apparently unfinished business of negotiating an equitable distribution of the property under subparagraph (h) of the "Limitation of Cost" clause. The record is unclear as to the residual value, if any, of the property. However, the right to such an equitable distribution is established and we direct the parties' attention in that regard to the guidance found in our decisions in Breed Corporation, ASBCA Nos 14523 and 15163, 86-3 BCA ¶ 19,086; and JRS Industries, Inc., ASBCA No. 33871, 87-2 BCA ¶ 19,796; reconsid. 87-3 BCA ¶ 20,057. The second exception to our denial of the appeal relates to the expenses incurred by the appellant in complying with the instructions of the TCO contained in the termination notice. The same law which compels our denying the appeal in major part requires the opposite result here where the direction came from an authorized contracting officer. See also Breed Corporation, 223 Ct. Cl. 702 (1980). Both of these matters are remanded for the parties to negotiate quantum.

Other than as stated in the preceding paragraph of this decision the appeal is denied.

Dated: 30 October 1992

/s/Edward F. Lussier
EDWAED [sic] F. LUSSIER
Administrative Judge
Member of the Armed Services
Board of Contract Appeals

I concur

/s/ William J. Ruberry
WILLIAM J. RUBERRY
Administrative Judge
Acting Chairman, Armed Services
Board of Contract Appeals

I concur

/s/ Alan M. Spector
ALAN M. SPECTOR
Administrative Judge
Vice Chairman, Armed Services
Board of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 40562, Appeal of HTC Industries, Inc., rendered in conformance with the Board's Charter.

Dated: 3 NOV 1992

/s/ Edward S. Adamkewicz
EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals

APPENDIX C

DEPARTMENT OF THE ARMY
U.S. ARMY LABORATORY COMMAND
MATERIALS TECHNOLOGY LABORATORY
WATERTOWN, MASSACHUSETTS 02172-0001

REPLY TO
ATTENTION OF

7 Mar 90

Procurement Division
SLCMT-PRA/Pemberton/617-923-5372 (715k)

SUBJECT: Dispute - Contract DAAG46-85-C-0026
Contracting Officer's Final Decision

HTC Industries, Inc.
ATTN: Dr. Harold T. Couch, President
11 Canaan Way
Simsbury, CT 06070

Dear Dr. Couch:

1. This is a final decision on your $2,180,241.00 claim for an equitable adjustment for what you consider a constructive change and which you filed with Mr. E. Harriman, Boston DCASR on 7 Nov 89. The claim was received in this office for resolution on 4 Dec 89. Due to the size, complexity and amount of your claim, it has taken me longer than expected to come to a decision in this matter. Inasmuch as I was not

a party to the events leading up to your claim, my final decision is based on the facts as indicated in the Official Contract File, discussions with parties involved and on the material you presented in support of your claim.

2. I understand your claim to be based on your allegation that:

a. The Contracting Officer's Technical Representative induced you to continue performance after funds were expended causing you to incur a cost overrun, and;

b. The Government failed to provide you with written authorization to proceed from one task to the next and to stop work after funds were expended;

3. I find that I must deny your claim in its entirety based on the facts as I have indicated below. I am however, willing to extend to you the same offer of the pilot electrodeposition facility and miscellaneous inventory as was made to you last fall.

4. Contract Details and Facts:

a. Cost Plus Fixed Fee Contract DAAG46-85-C-0026 was awarded to HTC, Inc. on 30 Mar 85. The Cost was negotiated at $230,520.00 with a fixed fee of $18,442.00 for a total contract amount of $248,962.00. The total amount of the contract was obligated at the time of award. The contract also stipulated the labor overhead rate was limited to 100% of direct labor costs and the general and administrative costs were not to exceed $500.00 per month.

Contract Section B.2 stated that FAR 52.232-20, Limitation of Cost clause was included in the contract and that the total amount of the contract constituted full and complete compensation for the contractor's services in connection with the work provided for and performed under the contract.

b. The contract performance period required that all work was to be completed within 18 months after date of contract award, making the completion date to be on or about 30 Sep 86.

c. Administration of the contract was assigned to Defense Contract Administration Services Management Area (DCASMA) Hartford, Connecticut. Payments were to be made by Defense Contract Administration Services Region (DCASR) Boston, Massachusetts. The Defense Contract Audit Agency (DCAA) Bridgeport, Connecticut, had the responsibility for cost audits.

d. The proposed work required HTC to provide all labor, materials, and equipment to manufacture and evaluate improved tools coated with Titanium Diboride (TiB2). The work was divided into four tasks, two tasks associated with the techniques of scaled-up production of a pilot electroplating system and two tasks associated with the verification of current economic and performance projections as follows:

Task I - Design and Feasibility Study of a Fused Salt Pilot Electrodeposition System.

Task II	-	Fabrication of the Titanium Diboride Electrodeposition Pilot System and Optimization of the Process.
Task III	-	Tool Production and Test.
Task IV	-	Economic and Field Performance Analysis.

Technical reports and data were required in accordance with with (sic) the Contract Data Requirements List (CDRL) DD Form 1423 and Data Item Description (DID) DD Form 1664. These two documents are contract attachments J.2 immediately following Pg 15 of the contract.

5. Contractor allegations and Contracting Officer findings: The following findings and decision will follow the allegations specified in your certified claim. I will address the items listed in your Overview, The Contract, Government Actions/Inactions, and Quantum (pages 1 thru (sic) 12) and in your Addendum (pages 15 thru (sic) 21).

(Overview)

a. Allegation: The accomplished work was consistant (sic) with the monies expended:

Finding: Records reveal and the Principal Investigator (Dr. Levy) indicate that you had accomplished only 52% of the total project contracted for whereas the total amount of the contract was negotiated to cover 100% of the research project. The material you produced was not optimized. Your tool production of approximately six unacceptable items was insufficient for testing. Proper

testing would require the 100 pieces contracted for. Your claim is for payment of approximately 1142% of the contract amount for actually performing only 52% of the work, certainly not consistant (sic) with the monies expended.

b. Allegation: The Contracts Division did not notify HTC of replacement Contracting Officer (CO).

Finding: There is no requirement for the Contracts Division to notify Contractors of changes in Contracting Officer (CO). In the absence or departure of a particular CO, any other warranted CO will handle the contract/ problem.

c. Allegation: HTC's formal, written proposal for Contract Extension with Cost Overrun, submitted to AMTL and the COTR was never answered.

Finding: You have alleged that all funds were expended by the end of June 86 and that such notification was provided in your bi-monthly Progress Reports 4 and 5. Records show that your Report 4, dated 11 Feb 86, Summary Paragraph 3, states in part "Contract costs are running fairly close to schedule and are estimated to be within 10 percent of target." Your cover letter on Report 5 dated 28 Jul 86, indicates that "Both schedular and cost overruns are anticipated. The schedular overrun is projected to be six (6) months..... Projected figures and the necessary documentation on the anticipated cost overrun will be sent to you under separate cover as soon as possible."

Your written proposal for a contract extension with overrun was delayed until until (sic) 11 Aug 86 and was not received in this office until late August 86. Records show that on 6 Sep 86, Dr. Levy telephoned you and told you that

there was no more money, instructed you not to continue working while he was going to try to find additional funds to continue the project.

A meeting was held with you in early September wherein the COTR told you that no further funds were available.

d. Allegation: The COTR directed you to continue working on at least four different occasions with the full knowledge that monies originally allocated to this contract had been expended.

Finding: Although it is acknowledged that the (sic) Dr. Levy did in fact authorize you to work from task to task as the research progressed, it was within the funds obligated and did not change the contract amount. He denies that he told you to continue working after funds were expended. You were allowed to continue working only because you were behind schedule, and you insisted on continuing performance on your own and at your expense to, as your (sic) put it, "protect my reputation".

e. Allegation: Payments to you continued throughout the research although express contract wording required that funds not be expended until authorized in writing by the CO, and that therefore you perceived such actions to be a constructive change to the contract.

Findings: Monthly payments were made to you upon submittal of your monthly invoices. That was not unusual in research contracting with a small business firm. The payments were not made by AMTL but by the paying offices of DCASR Boston.

f. Allegation: HTC was at no time advised by the MTL Contracts Division that no additional monies were to be allocated to the contract.

Finding: Inasmuch AMTL designated and delegated the administration of your contract to the Hartford DCASMA and the payment responsibility to DCASR Boston with audits to be performed by the DCAA Bridgeport, it was not as involved as it would have been had those responsibilities remained in the AMTL Contracts Division. The AMTL Contracts Division relied on those designated offices to monitor the contract.

Notwithstanding those delegations, the contract was very plain and specific that all work was to be performed within the funds obligated at time of award. During contract negotiations you made assurances to the Government that you were a qualified and responsible contractor capable of providing the Government with it's (sic) expected research results. I refer you to the second paragraph of Contract Section B.2 which states in part - "The Contractor shall be paid a fixed fee in the amount of $18,442.00, in accordance with the terms of the Contract Clause entitled "Fixed Fee" FAR 52.216-8, which fee together with reimbursement of costs as provided herein, shall constitute full and complete compensation for the Contractor's services in connection with the work provided for and performed under this contract."

Contract Section I, Clause 52.232-20, Limitation of Cost (Apr 1984), Paragraph (d)(1) reads (in part)"The Government is not obligated to reimburse the Contractor for costs incurred in excess of (i) the estimated cost specified in the schedule...." and Paragraph (d)(2) reads (in part) "The Contractor is not obligated to continue performance under

this contract (including actions under the Termination clause of this contract) or otherwise incur costs in excess of the estimated cost specified in the Schedule, until the Contracting Officer (i) notifies the Contractor in writing that the estimated cost has been increased and (ii) provides a revised estimated total cost of performing this contract...." Paragraph (e) reads (in part) "No notice, communication or representation in any form other than that specified in subparagraph (d)(2) above, or from any person other than the Contracting Officer shall affect this contract's estimated cost to the Government.

The AMTL Contracts Division 30 Mar 85 cover letter to your contract provided you with a copy of the letter appointing Dr. Levy as the COTR. The second paragraph of the cover letter and that of the COTR letter very specifically put you on notice that the letter does not authorize the COTR to issuse (sic) changes that would involve a change in unit price, total contract price, quantity, delivery schedule/completion date or reporting requirements. The third paragraph of the cover letter indicated that all questions regarding the limitations "will be" submitted to the Contracting Officer for a ruling or clarification. If you had any questions at all in that regard, you should have notified the Contracting Officer. HTC had every responsibility to be aware of it's (sic) contractural (sic) requirements as did the Government. You are now indicating that only the Government failed in it's (sic) responsibility.

g. Allegation: Failure to reach a mutually agreeable settlement caused HTC to lose its place of business, forced liquidation of capital assets and a de facto bankruptcy, that prohibition of the use of the plating system by the University of Connecticut forced abandonment of a contract with the

State of Connecticut. That HTC's financial destruction was as a direct result of Government action.

Findings: HTC considers the Government's refusal to unconditionally reimburse HTC for all overruns as a failure to mutually agree to a settlement. I find that you refused to negotiate anything less than the total amount of your alleged cost overrun. HTC's own business practices and business acumen caused/resulted in loss of it's (sic) place of business, liquidation of capital assets, de facto bankruptcy, and it's (sic) financial destruction. The U Conn issue is another matter. Government regulations prohibited AMTL from allowing you to use Government acquired equipment on a private venture between HTC and U Conn.

(The Contract)

NOTE: The contract itself is self explanatory and it's (sic) specifics are enumerated above in Paragraph 4, Contract Details and Facts. I will however address the problems that you state you encountered during the performance of the contract.

h. You state that the fabrication and debugging of the pilot facility was a much (sic) formidable undertaking than you had originally anticipated which resulted in your incurring substantial additional costs for the redesign, engineering and fabrication of this facility. You further state that you had an increase in the number of custom fabricated components required which you did not anticipate. You also had some problems with the delivery and assembly of the pilot system. I believe that your overly optimistic belief you could handle this research contributed to the above difficulties, increased the your (sic) costs and resulted in the current situation. The size of the heating pits, the plating

capacity and consequent heat load, the other increases in capacity and performance, and the number of custom fabricated components required should have been anticipated/known at the time you submitted a proposal in response to our Request for Proposals (RFP).

I will address what I perceive to be the reason for your continued work after funds have been expended in Paragraph 6. b. below. Your comments in your Claim Item II, Contract History - HTC's Bases for Relief and those in B, Contract Accomplishments During Period of Overrun are self evident. You have listed all of the problems and failures that you encountered. The Government does not agree with your alleged accomplishments being a 100% success. This is based on your only performing 52% of the contract requirements. A 100% success would have been a 100% contract completion with useful research information.

(Government Actions/Inactions)

i. Allegation: HTC was encouraged/directed to continue work under the contract by the COTR and that the CO abrogated it's responsibility to HTC.

Finding: The COTR adamantly denies encouraging or directing you to continue work under the contract after funds were expended. HTC had the responsibility to be aware of the contract requirements and authority and to protect it's (sic) own interests. HTC fails to acknowledge that it caused it's (sic) own demise, does not accept any responsibiiity for it's (sic) situation and simply points it's (sic) finger at the Government as the sole responsible party for all it's (sic) problems. I find that HTC in it's (sic) fervent pursuit of a reputation in research in the development of the electrodeposited titanium diboride plating process,

used this contract as it's (sic) vehicle and continued the work after funds were exhausted as a means to achieve those ends. The basis of this belief is as indicated in paragraph 6.b. below. In the opinion of this Contracting Officer, the issuance of the two terminations was only to emphasize what had already occurred. Contract Clause B.2, Estimated Cost, Fixed Fee and Pay[illegible]t, FAR 52.216-8 - Fixed Fee and FAR 52.232-20 - Limitation of Cost, clearly indicate that the contract is completed at the time funds are exhausted.

(Quantum)

j. Allegation: The dollar amount has increased several fold over any previous presentations due to the Government's financial destruction of HTC.

Finding: Your allegations are littered with "could" and "would" haves. Statements such as "HTC could have emerged as a thriving small company with a bright future", "HTC could have succeeded with the Government's award with the only pilot system", a repeated -"..had the Government reimbursed overrun costs incurred by HTC at the Government's direction on a timely and cost effective basis HTC would have emerged as a thriving small company with a bright future, (sic) "how different the situation would have been if the Government had promptly reimbursed HTC for the overrun", "sales would have outstripped cash expenditures", (sic) HTC would have been able to participate in the continued development of the TiB2 electrodeposition process with the University of Connecticut", "most likely would have been able to secure capitalization monies" and "it is extremely likely that at lease (sic) one of these ventures would have succeeded and the Company would have grown." All of these statements are self serving inconclusive conjectures, absolute guesswork.

I am sorry that your investment in your company and the loss of business opportunities did not materialize as you had hoped they would. It is indeed an unfortunate set of circumstances. It is always our desire to have a contractor succeed and the Government achieve it's (sic) objective.

(Addendum)

k. Allegation: Statements here are basically the same as provided in other parts of your claim. You contend that your instructions were to "Just continue working - I will find the money."

Finding: Dr. Levy vehemently denies making that statement to you.

1. Allegation: Contract was not terminated until Apr 88.

Finding: Contract Clause B.2 and the Limitation of Cost Clause made the contract self-terminating at the point funds were expended. In the opinion of this Contracting Officer there was no need to issue terminations. The terminations issued were merely administrative actions.

m. Importance of Technology - Applications of Benefit to the Army. Decisions as to research to be performed is (sic) not within my perview (sic). The Army decided not to continue this research and therefore did not allocate additional funds.

6. Final Decision:

a. I must deny your claim in it's (sic) entirety. This decision is based on the findings as indicated above. The

facts show that you were not "enduced" (sic) and/or directed by the COTR to continue work after funds were expended.

b. I suggest that your "enducement" (sic) to continue working after funds were expended was for the sole purpose of entering into a partnership/and or possible sell out of HTC, Inc. to a R. J.Weiss. Your Claim Exhibit 31 clearly indicates that you were involved in serious discussions with Mr. Weiss at the exact time frame immediately prior to and immediately after and long after Army funds were expended.

The first correspondence from Mr. Weiss to you is dated 16 May. I find that this was in 1986. You responded to Mr. Weiss on 29 May 86 indicating to him that you were "interested in potential new business opportunities involving TiB2 and would be happy to work with you in the development of opportunities of mutual interest." You further indicate that "Accordingly after some period of time (5 years) HTC Industries was finally able to get some support, and we are presently under government contract to fabricate a pilot electrodeposition facility and develop the requisite QC parameters ....." R.J. Weiss 6 Jun 86 memo makes inquiry as to your interest in a partial sellout to the right company and indicates that he will contact you with a mutually useful deal. Days later you respond that "it will take me a little time to deliver the specimens you requested as the plating facility component parts have just been delivered to HTC premises..." and that you were in the process of assembling them. You further indicated to him that you then face perhaps 2-3 months of rigorous laboratory work to zero in on the "window" of acceptable process conditions before I can tackle your sample pieces."(sic) You indicate to him that "time of your inquiry (concerning a possible sellout) is close to optimum". You go on to state that you will owe the Army a process patent disclosure.

You comment on the "potentially attractive commercial opportunities for TiB2 coatings.(sic) You state that you would seriously consider any reasonable buy out offer if it involved not more than two to three years of indentured service to transfer technology, reputation, contracts, etc. You suggest that you and Mrs. Couch would be willing to meet with him in England for discussions.

Mr. Weiss in his 23 Jun 86 response to you indicates "Until I get samples from you there's no need to get together." He gives you assurance of a good development contact if your coatings are as good as you implied. His P.S. is "Do you have any pieces at all?"

There is no further correspondence between you and Mr. Weiss in the file you presented until your 20 Feb 87 letter to him. In that letter you tell him that "..the TiB2 coating process has not gone as smoothly as I had anticipated six to eight months ago." and you discuss the problem. You state that you are enclosing "a small coupon of recent production ..." and again discuss a problem with that coupon and that you are having troubles with the bonding process and how you hope to correct the problems.

You make the following statement "I was finally able to get Milt Levy off the hook - i.e. the development was considerably behind schedule and over budget - by delivering some plated tools which at least appeared credible, and he is doing what he can to help on the analytical end. On the financial end however we may both be stymied as Congress appears to have substantially pared both the '87 and '88 DoD budgets, and as you well know the impact on R&D funds is disproportionately amplified. Therefore if you still have a client who is interested in chasing the development of TiB2 we should all be talking to him." You ask him to keep you

informed on testing they have performed on the "coupon" you provided. Mr. Weiss responds to you on 6 Mar 87 thanking you for the sample. It appears he was not overly impressed with it.

I maintain that that (sic) the above personal business possibilities were what "enduced" (sic) you to continue performance after funds were expended.

I am also very much concerned about your performing research work under a Government contract on a cost reimburseable (sic) basis and providing both samples and research information to a foreign firm for personal profit. This research was for the Department of Defense (DOD) for military application. Army Regulation 380-10, Disclosure of Information and Visits and Accrediation (sic) of Foreign Nationals, Department of Defense - The Military Critical Technologies List (Volumes classified secret and unclassified listing) carry very specific prohibitions regarding technology transfer with Foreign nationals and countries. Although it appears that Mr. Weiss is an American citizen, his memo to you dated 23 Jun 86 shows that he is "now associated with a company that can support such development programs." He does not identify the company. Again, since this research was for military application, we have no evidence of HTC being issued an approved license to send samples and/or material/information to Mr. Weiss. The Arms Export Control Act requires an approved license for any item that is listed on the U.S. Munitions List.

Contract Provision G.4, Public Dissemination of Information, very clearly states that you may not release any information without approval. Further Contract Provision H.1, Government Property, also very clearly states that all

test specimens, etc. shall become the property of the U.S. Government at the completion of the contract.

c. This is the final decision of the Contracting Officer. You may appeal this decision to the Board of Contract Appeals. If you decide to appeal, you must, within 90 days from the date your (sic) receive this decision, mail or otherwise furnish written notice to the Board of Contract Appeals and provide a copy to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. Instead of appealing to the Boar of Contract Appeals, you may bring an action directly in the U.S. Claims Court (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision. If you appeal to the Board of Contract Appeals, you may, solely at your election, proceed under the Board's small claims procedure for claims of $10,000 or less or its accelerated procedure for claims of $50,000 or less.

MARY J. PEMBERTON
Contracting Officer

APPENDIX D

United States Court of Appeals
For the Federal Circuit

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on April 22, 1994.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: April 15, 1994

By /s/Diane M. Frye
Diane M. Frye
Chief Deputy Clerk

cc: JOSEPH H. GIBSON
DOMENIQUE KIRCHNER

HTC INDUSTRIES V DEFENSE, 93-1304
(BCA - 40562)

APPENDIX E

ARMED SERVICES
BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
HTC Industries, Inc.	)	ASBCA No. 40562
	)	
Under Contract	)	
No. DAAG46-85-C-0026	)	

APPEARANCE(S) FOR
THE APPELLANT: Dr. Harold T. Couch, President
Christine B. Couch, Secy/Treasurer

APPEARANCE(S) FOR
THE GOVERNMENT: COL Riggs L. Wilks, Jr., JA
Chief Trial Attorney
MAJ Oren W. Smith, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE LUSSIER
ON THE APPELLANT'S MOTION
FOR RECONSIDERATION

By letter dated 9 November 1992 the appellant moved for reconsideration of the Board's decision of 30 October 1992 on the basis that the identity of the specific contracting officer on the subject contract during the time of the overrun was never established. It contends that the Board's decision appears to be based largely and predominantly on the

unsupported premise that there was a contracting officer who was not kept informed when in fact there was no such person. In support of its contention it attaches a copy of pages 17-21 of its Interrogatory Set III, although only page 21 was introduced into evidence at the hearing. We have been given no reason why this additional evidence could not have been offered at that time. It does not meet the test for newly discovered evidence, that is, evidence existing at the time of the hearing of which the party was excusably ignorant and which could not have been discovered by the exercise of due diligence in time to present at the hearing. Thus, it is inadmissible. Nevertheless, we observe that the apparent purpose of its introduction at this time, namely to show that Barbara Gelaznik denied she was the contracting officer assigned to the contract and that she thought Alex Navrez was, is immaterial to the decision we reached. It does not affect the controlling fact that appellant has not established that anyone with authority to bind the Government ever ordered, authorized or ratified continued contract performance under an express or implied promise to pay for such performance.

By letter dated 19 November 1992, appellant amended its 9 November motion to add a handwritten note, apparently made by Mrs. Couch, regarding a 7 March 1989 meeting, without offering any reason why it could not have been offered at the hearing in 1992. It does not qualify under the rule of newly discovered evidence and is inadmissible. The apparent purpose of the 19 November amendment and its attached offer of evidence is to show that Alex Navrez was the assigned contracting officer at the time of a 5 February 1988 meeting with appellant. Again, this is

immaterial to the decision. As our decision noted, Dr. Couch testified that he understood Mr. Navrez did not have the final approval authority on the tentative agreement the parties had reached.

To the extent that appellant's motion seeks to retry its appeal with further evidence and a new hearing it must be denied. We have reconsidered our 30 October 1992 decision and having done so, we affirm it.

Dated: 14 December 1992

/s/Edward F. Lussier
EDWARD F. LUSSIER
Administrative Judge
Member of the Armed Services
Board of Contract Appeals

I concur

/s/ William J. Ruberry
WILLIAM J. RUBERRY
Administrative Judge
Acting Chairman, Armed Services
Board of Contract Appeals

I concur

/s/ Alan M. Spector
ALAN M. SPECTOR
Administrative Judge
Vice Chairman, Armed Services
Board of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 40562, Appeal of HTC Industries, Inc., rendered in conformance with the Board's Charter.

Dated: 15 DEC 1992

/s/ Edward S. Adamkewicz
EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals

APPENDIX F

STATUTES AND REGULATIONS INVOLVED

31 U.S.C. § 1341

§ 1341. Limitations on expending and obligating amounts

(a) (1) An officer or employee of the United States Government or of the District of Columbia government may not--

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;

(C) make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985; or

(D) involve either government in a contract or obligation for the payment of money required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.

(2) This subsection does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government.

(b) An article to be used by an executive department in the District of Columbia that could be bought out of an appropriation made to a regular contingent fund of the department may not be bought out of another amount available for obligation.

31 U.S.C. § 1342

§ 1342. Limitation on voluntary services

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. This section does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government. As used in this section, the term "emergencies involving the safety of human life or the protection of property" does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

31 U.S.C. § 1349

§ 1349. Adverse personnel actions

(a) An officer or employee of the United States Government or of the District of Columbia government violating section 1341(a) or 1342 of this title shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office.

(b) An officer or employee who willfully uses or authorizes the use of a passenger motor vehicle or aircraft owned or leased by the United States Government (except for an official purpose authorized by section 1344 of this title) or otherwise violates section 1344 shall be suspended without pay by the head of the agency. The officer or employee shall be suspended for at least one month, and when circumstances warrant, for a longer period or summarily removed from office.

31 U.S.C. § 1350

§ 1350. Criminal penalty

An officer or employee of the United States Government or of the District of Columbia government knowingly and willfully violating section 1341(a) or 1342 of this title shall be fined not more than $5,000, imprisoned for not more than 2 years, or both.

48 C.F.R. § 32.704

32.704 Limitation of cost or funds.

(a) (1) When a contract contains the clause at 52.232-20, Limitation of Cost; 52.232-21, Limitation of Cost (Facilities); or 52.232-22, Limitation of Funds, the contracting officer, upon learning that the contractor is approaching the estimated cost of the contract or the limit of the funds allotted, shall promptly obtain funding and programming information pertinent to the contract's continuation and notify the contractor in writing that--

(i) Additional funds have been allotted, or the estimated cost has been increased, in a specified amount;

(ii) The contract is not to be further funded and that the contractor should submit a proposal for an adjustment of fee, if any, based on the percentage of work completed in relation to the total work called for under the contract;

(iii) The contract is to be terminated; or

(iv) (A) The Government is considering whether to allot additional funds or increase the estimated cost, (B) the contractor is entitled by the contract terms to stop work when the funding or cost limit is reached, and (C) any work beyond the funding or cost limit will be at the contractor's risk.

(2) Upon learning that a partially funded contract containing any of the clauses referenced in subparagraph (1) above will receive no further funds, the contracting officer shall promptly give the contractor written notice of the decision not to provide funds.

(b) Under a cost-reimbursement contract, the contracting officer may issue a change order, a direction to replace or repair defective items or work, or a termination notice without immediately increasing the funds available. Since a contractor is not obligated to incur costs in excess of the estimated cost in the contract, the contracting officer shall ensure availability of funds for directed actions. The contracting officer may direct that any increase in the estimated cost or amount allotted to a contract be used for the sole purpose of funding termination or other specified expenses.

(c) Government personnel encouraging a contractor to continue work in the absence of funds will incur a violation of Revised Statutes Section 3679 (31 U.S.C. 1341) that may subject the violator to civil or criminal penalties.

No. 94-57

(2)

Supreme Court, U.S.
FILED
SEP 6 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

HTC INDUSTRIES, INC., PETITIONER

v.

WILLIAM J. PERRY, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a government contractor is entitled to additional reimbursement when the contractor voluntarily continues work after its costs have exceeded the contract price and no contracting officer has approved additional funds.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-16a) is unpublished, but the decision is noted at 22 F.3d 1103 (Table). The initial decision of the Armed Services Board of Contract Appeals (Pet. App. 17a-58a) is reported at 93-1 B.C.A. (CCH) ¶ 25,560 and its decision on reconsideration (Pet. App. 77a-80a) is reported at 93-2 B.C.A. (CCH) ¶ 25,701.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1994. A petition for rehearing was denied on April 15, 1994. Pet. App. 75a-76a. The petition for a writ of certiorari was filed on July 8, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was awarded a contract by what is now the Army Materials Technology Laboratory (the Laboratory) to design and fabricate a pilot facility for electroplating titanium diboride, an extremely hard material, onto machine tools. Dr. Harold T. Couch, petitioner's president, anticipated commercial and military uses for the coatings and hoped to advance the process and make production economically feasible. The contract provided that petitioner would receive reimbursement based on "cost plus fixed fee." The parties specified an estimated cost of $230,520 and a fixed fee of $18,442, for a total contract price of $248,962. Under the contract, that sum represented "the estimated cost for the purpose of the Contract Clause entitled 'Limitation of Cost' FAR [Federal Acquisition Regulation] 52.232-20." Pet. App. 18a, 20a-21a.

FAR 52.232-20(b) requires the contractor to notify the project's contracting officer whenever it has reason to believe that, within the next 60 days, the total of costs anticipated and already incurred will exceed 75 percent of the estimated cost.[1] Unless the contract specifies otherwise, the government has no obligation to reimburse a contractor for costs incurred in excess of the estimated cost. FAR 52.232-20(d)(1). Correspondingly, under FAR 52.232-20(d)(2), the contractor is not obliged to continue performance or to incur costs in excess of the estimated cost until the contracting officer notifies the contractor in writing that the estimated cost has been increased and provides a revised estimated total cost. No notice in any form other than that specified in

---

[1] FAR 52.232-20 (1984), which is codified at 48 C.F.R. 52.232-20, is set out in pertinent part at Pet. App. 19a-20a.

FAR 52.232-20(d)(2), "or from any person other than the [c]ontracting [o]fficer," can affect the contract's estimated cost. If the contracting officer has not provided such notification, the government is not obligated to pay more than the estimated cost. FAR 52.232-20(e).[2]

2. The contract in this case instructed the contracting officer to "designate in writing a Contracting Officer's Technical Representative (COTR)" to represent him in "technical matters under this contract." Pet. App. 26a. That provision expressly limited the COTR's authority as follows:

> NOTE: NO DIRECTION, INSTRUCTION OR INFORMATION, EMANATING FROM THE COTR, OR ANY PERSON EMPLOYED BY THE UNITED STATES GOVERNMENT, WHICH MAY * * * CHANGE THE ESTIMATED COST OF THE WORK UNDER THE CONTRACT * * * SHALL BE BINDING ON THE GOVERNMENT UNLESS A PRIOR AUTHORIZED INSTRUMENT OR MODIFICATION TO THIS CONTRACT IS DULY ISSUED BY THE CONTRACTING OFFICER.

Id. at 27a.

---

[2] FAR 32.704(a)(1) sets out the notification process under FAR 52.232-20. Upon learning that the contract is approaching its estimated cost, the contracting officer is to obtain funding and programming information promptly and then notify the contractor that additional funds have been allotted, that there will be no further funding, that the contract is terminated, or that the government is still weighing the decision and the contractor may either stop work when the cost limit is reached or continue at its own risk. See 48 C.F.R. 32.704(a)(1) (set out at Pet. App. 84a-85a).

The contracting officer designated Milton Levy, an experienced researcher and scientist, as COTR for the contract, and the contracting officer sent petitioner a copy of the official appointment letter. Pet. App. 25a. That letter delegated to Levy the contracting officer's authority to take all actions not specifically prohibited by the contract, "PROVIDED such actions DO NOT involve a change in price." *Ibid.* (quoting March 30, 1985 appointment letter (capitalization in original)). In addition, the contracting officer's accompanying letter expressly noted Levy's lack of authority to issue changes affecting contract price. *Id.* at 26a. Couch, petitioner's president, knew of the written limitations on Levy's authority and of the specific terms of the FAR "Limitation of Cost" clause. *Id.* at 34a-35a.

3. During the construction of the pilot facility, petitioner's costs exceeded 75 percent of the estimated contract cost. Petitioner did not notify the government of that development at that time. Pet. App. 22a-23a. Petitioner then submitted a proposal for a contract price increase to $371,034. *Id.* at 24a. The contracting officer did not send petitioner a notice of decision on that overrun proposal. *Id.* at 35a-36a. Couch and Levy had a series of meetings and conversations concerning the technical progress of the work. *Id.* at 28a-34a. Levy encouraged Couch to continue to supply samples for the Laboratory to test. *Id.* at 34a. Levy also told Couch that he would try to find the money to pay for work done above the estimated cost. *Ibid.* Levy, however, gave no assurance of any additional money, and Couch knew or should have known that Levy had provided no guarantees. *Ibid.*[3]

---

[3] For example, Couch laid off an employee, explaining that he did not expect Levy to find additional money for the project, and

During that period, petitioner encountered technical problems in performing the contract work. Pet. App. 30a-32a. In addition, a system regulator at petitioner's facility failed, causing extensive damage. *Id.* at 33a. At the time, the government had reimbursed petitioner for about two-thirds of the cost of the facility. *Ibid.* Without instruction or permission from the government, Couch repaired the facility. He did so in anticipation of receiving a grant from the State of Connecticut to continue the work in conjunction with the University of Connecticut. *Id.* at 33a-34a.

4. The government issued a Notice of Termination of the Contract for the Government's Convenience under FAR 52.249-6. Pet. App. 38a. Petitioner's attorney submitted a settlement proposal seeking $195,252.81. *Id.* at 39a. The Termination Contracting Officer (TCO) ultimately allowed $6,107.47, the difference between what petitioner had already been paid and the contract limit of $248,962. *Ibid.* In addition, the government offered to allow petitioner to retain the facility and miscellaneous inventory. *Id.* at 41a. Petitioner rejected that offer and filed a claim with the TCO for equitable adjustment under FAR 52.243-2. Petitioner sought $2,180,241, based on its allegations that Levy instructed petitioner to continue working and that the contracting officer failed to respond to petitioner's overrun notice and proposal for extension. Pet. App. 41a. The TCO denied the claim but renewed the government's earlier offer concerning the facility and inventory. *Id.* at 43a, 60a.

5. The Armed Services Board of Contract Appeals denied petitioner's claim for reimbursement. Pet. App.

Couch wrote to a colleague that he and Levy "may both be stymied" by congressional budget cuts for research and development. Pet. App. 31a-32a.

49a-57a. The Board rejected petitioner's claims that Levy had authorized reimbursement, stating that the written terms of the contract "could not have been clearer" with respect to Levy's lack of authority to bind the government for cost overruns. *Id.* at 50a. The Board also concluded that the government did not impliedly ratify the funding commitments that petitioner alleged Levy to have made. *Id.* at 52a. The Board specifically noted that the government's failure to provide an official response to petitioner's overrun proposal did not entitle petitioner to reimbursement for work it subsequently performed. *Id.* at 52a-53a. The Board also concluded that even if petitioner could invoke equitable estoppel against the government on a government contract claim, petitioner failed to satisfy the requirements for that relief. *Id.* at 53a-55a. The Board ordered the parties to resume negotiations so as to arrive at "an equitable distribution of all property produced or purchased under the contract," as provided by FAR 52.232-20(h) (48 C.F.R. 52.232-20(h)). Pet. App. 57a.

6. The Federal Circuit affirmed the Board's decision, holding that the decision was supported by substantial evidence. Pet. App. 1a-8a. The court found that the contract's "[e]xplicit, unambiguous language" established Levy's lack of authority to modify the cost estimate. *Id.* at 4a. It held that no authority beyond the written contract could be implied here, because Couch admitted knowing the written restrictions on Levy's authority. *Id.* at 4a-5a. The court further held that Couch's knowledge that reimbursement for the cost overrun could not be expected precluded any basis for invoking equitable estoppel. *Id.* at 6a-7a. The court noted that petitioner always had the option of refusing to perform further without authorization from the contracting officer "as the contract envisioned." *Id.* at

7a. Judge Newman dissented from the court of appeals' decision.

ARGUMENT

Congress has conferred exclusive jurisdiction upon the Federal Circuit to review disputes arising under the Contract Disputes Act of 1978, 41 U.S.C. 607(g). That court reviewed the decision of the Armed Services Board of Contract Appeals and properly affirmed the Board's decision rejecting petitioner's demand for additional reimbursement. The Federal Circuit and the Board resolved the dispute by applying the plain terms of the contract to the facts of this particular case. That factbound decision is correct and does not warrant further review. See *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980).

The Federal Circuit and the Board accurately characterized this case as "a classic example of why contracts are put in writing." Pet. App. 4a, 56a. The contract and the regulations it incorporated expressly specified how cost overruns would be resolved. The contract, the applicable regulations, and other correspondence sent to petitioner clearly informed petitioner that Levy, who served solely as the contracting officer's technical representative, could not obligate the government to provide additional funding. See Pet. App. 3a-5a, 18a-20a, 25a-27a; FAR 52.232-20 (1984), 48 C.F.R. 52.232-20.

Couch, who served as petitioner's president, knew that the express terms of the contract, the FAR, and Levy's appointment letter all prevented Levy from binding the government for reimbursement of cost overruns. Pet. App. 5a, 34a-35a. Couch also knew or should have known that Levy never promised such reimbursement. *Id.* at 7a, 34a. Indeed, even if Levy had guaranteed payment, petitioner would not have been entitled to rely on that

guarantee in the absence of the contracting officer's ratification. *Id.* at 7a, 52a. See FAR 52.232-20(d)(2) and (h). Any encouragement Levy might have offered with respect to continued funding or work could neither override the plain words of the contract and the FAR nor provide a basis for invoking equitable estoppel principles. See Pet. App. 6a-7a; 53a-56a.

As the court of appeals and the Board explained, in the absence of a contracting officer's written overrun approval, petitioner could either keep working and hope for the best or cease performance. Pet. App. 7a, 53a. See FAR 52.232-20(d)(2). Petitioner elected to continue working despite the cost overruns and thereby assumed the risk that it might not be reimbursed for the additional expenses it incurred.[4]

---

[4] Petitioner's various subsidiary contentions are without merit. For example, petitioner claims (Pet. 15) that a "misrepresentation" by another government employee as to the availability of a contracting officer prevented petitioner from dealing with one. Both the Board and the court of appeals rejected that factual claim and found that "no authorized officer of the Government misled [petitioner]." Pet. App. 6a. Indeed, the facts show that Couch studiously avoided communication with anyone other than Levy as a calculated tactic to maximize his chance for additional funding. See *id.* at 34a. Petitioner's other allegations of misrepresentation and fraud are similarly without foundation and do not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
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SEPTEMBER 1994

(3)

No. 94-57

Supreme Court, U.S.
FILED
SEP 14 1994
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

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Petitioner,

v.

WILLIAM PERRY, SECRETARY
OF DEFENSE,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Federal Circuit

REPLY TO BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

No. 94-57

HTC INDUSTRIES, INC., PETITIONER,

V.

WILLIAM PERRY, SECRETARY
OF DEFENSE, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY TO BRIEF IN OPPOSITION

The government's brief in opposition evades the questions presented, distorts the factual findings of the Board of Contract Appeals, and ignores the conflicts between the decision of the Federal Circuit in this case and the long line of precedents from this Court and the Court of Claims.

The government directs its brief in opposition to a question not presented in the petition -- i.e., whether the government employees who misled petitioner, HTC Industries, Inc. ("HTC"), were contracting officers. Gov't

Brief at 7-8. HTC assumes, without conceding, that they were not.

The questions that are presented -- and that the government never discusses -- profoundly affect the area of government contract law: (1) whether the government's contractual duty of good faith and fair dealing extends to the affirmative misrepresentations of contract personnel other than contracting officers, and (2) if these personnel take something from a contractor for the benefit of the government, whether the contractor is entitled to equitable relief for the value of that benefit. By ignoring these issues, the government hopes to preserve the unfair contracting advantage the Federal Circuit has given it here and in *Hoskins Lumber Co. v. United States*, 20 F.3d 1144 (Fed. Cir. 1994).[1] This Court should address these issues and restore balance between the government and its contractors.

In an apparent attempt to convince the Court that this case involves a "factbound" decision unworthy of review, Gov't Brief at 7, the government misrepresents the controlling findings of the Board of Contract Appeals. Most brazenly, the government states that "[b]oth the Board and the court of appeals rejected [the] factual claim" that "a 'misrepresentation' by [a] government employee as to the availability of a contracting officer prevented petitioner from

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[1] For a discussion of *Hoskins*, see Pet. at 20-22. On July 5, 1994, the Federal Circuit denied the contractor's petition for rehearing and declined its suggestion of rehearing en banc in *Hoskins*. 1994 U.S. App. Lexis 18039 (Fed. Cir. 1994).

dealing with one." Gov't Brief at 8 n.4. HTC respectfully refers the Court to the Board's findings: "[i]n early August 1986, Dr. Couch had called the AMTL Contracts Division and talked to Andrew DeVita, a contract specialist assigned to this contract (tr. 2/58). Mr. DeVita advised him that *no contracting officer had been assigned to the subject contract* ...." Pet. App. at 35a-36a (emphasis added). *See* Pet. at 4-5. Contrary to the government's suggestion, nothing in the decision of the Court of Appeals in any way rejects this factual finding of the Board. Pet. App. at 1a-8a.

All the while, the government knew it had assigned a new CO to the contract and never notified HTC. Pet. App. at 35a-36a. That fact reveals the falsity in the government's next contention that Dr. Couch "studiously avoided communication with anyone other than [the COTR] as a calculated tactic to maximize his chance for additional funding." Gov't Brief at 8 n.4. Dr. Couch could not communicate with the CO because the government would not tell him who the CO was. *See* Pet. App. at 10a. Indeed, the "barely visible" CO studiously avoided her regulatory obligation to respond to HTC's written proposal for overrun funding. *See* Pet. App. at 35a-36a; 48 C.F.R. § 32.704 (reprinted in Pet. App. at 84a-85a).

The government's statement of the case is no better. Gov't Brief at 2-7. A full exposition of every error it contains is not appropriate here, but two examples should suffice to discredit it. First, the government's statement does not provide a single date to give context to the events that happened. *Id.* For example, the government relies on Dr. Couch's having laid off an employee and his having

written a letter about budget cuts as evidence of his knowledge that the project would not receive additional funding. Gov't Brief at 4-5 n.3. The government fails to mention that both of these events occurred in February 1987 at the very end of the period of continued work and long after most of the COTR's misrepresentations about further funding. Pet. App. at 31a-32a.

Second, the government's statement leaves large gaps in the story. For example, it does not mention the government's bad faith in the settlement negotiations in the spring of 1988. *See* Gov't Brief at 5. *Cf.* Pet. at 6-7; Pet. App. at 14a-16a, 37a-39a. In short, the government's rendition of the facts is "without foundation" -- not HTC's. *See* Gov't Brief at 8 n.4.

The government's inaccurate reporting of the record should not lead the Court to the conclusion that this case is factbound and inappropriate for review here. In fact, this case presents two fundamental legal issues in the area of government contract law, and the Board's factual findings provide a concrete and unambiguous background for the resolution of those issues in this case.

On both issues, HTC's petition identified conflicts between the decision of the Federal Circuit in this case and a long line of precedents from this Court and the Federal Circuit's predecessor, the Court of Claims. Pet. at 12-19. The government's brief does not address these conflicts at all. HTC submits that by failing to address these conflicts, the government tacitly admits that they exist and that they must be resolved. These serious conflicts warrant this

Court's review. Moreover, HTC suggests that summary reversal is in order, particularly as to the equitable relief issue.

The petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit should be granted.

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